Using a background-vernacularist approach to promote compliance with CEDAW, with reference to Egypt and Tunisia

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Summary

This thesis examines the possibility of promoting human rights by utilising cultural norms and values. It focuses on the Convention on the Elimination of All Forms of Discrimination against Women ('CEDAW'), particularly Article 5(a). CEDAW is considered to be the global bill of women's human rights, and the majority of countries have become states parties to it. When ratifying CEDAW, a state is required to change its national laws, social policies, administrative law and social practices in order to achieve the equality of women (article 2(f)).

Article 5(a) of CEDAW requires states parties to change or modify cultural norms in order to achieve 'the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women'.

In order to understand how culturally-informed methods can be deployed to promote women's status and social change, this thesis presents what I call the background-vernacularist approach as a theoretical framework. Through this theoretical framework, the thesis attempts to understand possible strategies for compliance with article 5 (a). The background-vernacularist approach involves promoting change in those aspects of the cultural background that underpin discrimination, as well as vernacularizing women's human rights norms and principles in the local legal and social context.

I use Egypt and Tunisia as case studies because they are both states parties to CEDAW and I am familiar with the legal and social issues facing these countries. Both countries have a history of debates about women's rights that suggest they have the potential to deploy cultural tools to improve women's status and compliance with CEDAW.

Understanding how the background-vernacularist approach operates can give a better comprehension of how one can deploy a hybrid discourse strategically and normatively. We assume culture sometimes has a negative effect on women's rights. However, a deeper understanding of a particular culture might allow for the use of certain aspects of that culture to promote women's rights. This deeper understanding would allow for a better dialogue about the nature of culture and why some changes

seem to be more acceptable than others. This more sophisticated dialogue would improve the ability of various actors to engage in the hybrid discourse this thesis suggests should occur. It suggests that human rights discourse should be a hybrid discourse that can mediate between human rights culture and local culture. This thesis shows how such a discourse has in fact been deployed in Egypt and Tunisia in historical intellectual movements and legislative reforms to support improvements in women's status in these countries.

The background-vernacularist approach is unlikely to offer immediate or easy solutions. But, over time, women's human rights may be promoted and protected through the states parties' commitment and through cooperation with governmental and non-governmental organizations, human rights advocates and private actors. To achieve these aims, states parties to CEDAW may find the background-vernacularist approach and its hybrid discourse useful as a long-term strategy to enable social change and women's full legal and substantive equality.

Declaration

I certify that this thesis does not incorporate without acknowledgement any material previously submitted for a degree or diploma in any University; and that to the best of my knowledge and belief it does not contain any material previously published or written by another person except where due reference is made in the text.

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Acknowledgements

Chapter 1

A possible way to promote compliance with CEDAW

I. Introduction

The international human rights system provides states parties with very good guidance on how to achieve women's human rights. Of course, international human rights conventions are not merely *guidance* because, in becoming a state party to a convention, the state is obliged to comply with its provisions.[1] This is because the international human rights system is part of international law. As described by Hilary Charlesworth and Christine Chinkin, international law is 'a mechanism for distributing power and resources in the international and national communities'.[2] As Charlesworth and Chinkin point out, international law provides several 'normative prescriptions: from regulating coercive behaviour between states, and between states and non-state actors, to the allocation and control of space and territory'.[3] It also provides a wide range of norms and principles that international society is encouraged to comply with such as the protection of human rights, the protection of the global environment and animal rights, as well as 'the management of the international system of trade and finance'.[4]

In this sense, international human rights conventions, as part of international law or the international legal system, oblige their states parties to comply with their provisions and norms.[5] Although there is room for making reservations to some

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[1] Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (Oxford University Press, 3rd ed, 2008); Donald Rothwell, Stuart Kaye, Afshin Akhtarkhavri and Ruth Davis, *International Law: Cases and Materials with Australian Perspectives* (Cambridge University Press, 2011).
[2] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Juris Publishing, 2000) 1.
[3] Ibid.
[4] Ibid.
[5] Human Rights Committee: General Comment No 31, *The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN CCPR (2187th mtg), UN Doc CCPR/21/Rev.1/Add.13 (29 March 2004) [80].

articles of such conventions, states are encouraged to work on withdrawing their reservations.[6]

One of the important international human rights conventions that obliges its states parties to achieve equality on various levels is the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).[7] Rebecca Cook points out that CEDAW has attracted more reservations than any other international human rights convention at the time of its ratification.[8] Indeed, as the main international human rights convention that concerns women's human rights, CEDAW has been more controversial than any other convention because women's human rights is a controversial topic in itself. There are a diversity of arguments regarding what women's rights are and how such rights ought to be achieved in each society. To understand what women's human rights are, this thesis relies on CEDAW. For a possible strategy to promote compliance with CEDAW in the long term, this thesis proposes what I call the 'background-vernacularist' approach. This approach promotes change in the cultural background at the same time as vernacularizing human rights norms.[9]

The background-vernacularist approach is used in this thesis in two ways. First, I argue that it is a useful theoretical analysis which assists us to understand certain arguments that have been made in favour of the advancement of women's status in Egyptian and Tunisian history. Through the lens of the background-vernacularist approach, it is possible to understand how cultural tools and values have been used to challenge the cultural background and how some external concepts have been vernacularized. Second, I argue that the background-vernacularist approach can be proactively deployed to support and promote change. Many existing interventions undertaken in the name of women's rights use similar methodologies, and my objective is to provide a general framework for understanding these approaches.

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[6] To be discussed further in Chapter 6.

[7] *Convention on the Elimination of all Forms of Discrimination against Women*, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981) (CEDAW).

[8] Rebecca Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination Against Women' (1989) 30 *Virginia Journal of International Law* 643.

[9] Susan J Hekman, *The Future of Differences: Truth and Method in Feminist Theory* (Polity Press, 1999); Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law Into Local Justice* (University of Chicago Press, 2006).

This introductory chapter is divided into several parts. Part I describes the research problem of the thesis. It also highlights the reasons for selecting Egypt and Tunisia as case studies. In addition, it discusses the reasons behind choosing CEDAW as the focus of the research, instead of other international human rights conventions. Part II outlines the background-vernacularist approach, which will also be explained more fully in Chapter 2. Part III briefly discusses feminism and its relationship with the deployment of cultural tools and norms for achieving change. Part IV discusses the boundaries of the thesis and Part V provides an outline of the thesis.

A. The research problem

The main research problem of this thesis is that there are cultural obstacles to achieving women's human rights in many countries, and an approach is needed that enables us to understand how to promote cultural change in order to make countries more receptive to women's rights and equality, especially as these are reflected in CEDAW.[10] For the purpose of this thesis, I have chosen article 5(a) of CEDAW as my main focus. This is because it obliges state parties to promote social change and legislative reforms to eliminate discrimination against women and promote women's formal and substantive equality; I will explain this in more detail later in this chapter and in Chapter 7. The main argument of this thesis is that an emphasis upon cultural change may lead to closer compliance with CEDAW, if we pay careful attention to the culturally-informed methods of promoting such change. As I will discuss in chapters 2 and 8, there have been many suggestions by international human rights treaty bodies, and some international law and human rights law scholars and professionals, about how to overcome cultural barriers in order to promote human rights. There have also been a number of practical attempts to overcome these barriers. These suggestions and attempts include attention to matters such as human rights education and situating human rights in the local discourse.[11]

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[10] The CEDAW Committee's general comments on cultural barriers to recognition of women's human rights will be discussed in Chapter 7. The discussion of culture and how it cannot be considered as unchangeable and its relationship with article 5(a) will be discussed in chapters 7 and 8.

[11] Human Rights Committee: General Comment No 28, *Article 3 (The equality of rights between men and women)* UN HRI (1834th mtg), UN Doc HRI/GEN/Rev.9/(Vol 1) (29 March 2000); Committee on Economic, Social and Cultural Rights: General Comment No 16, *The equal right of men and women to the enjoyment of all economic, social and cultural rights (art 3 of the International Covenant on Economic, Social and Cultural Rights)* UN ESC, 34th sess, E/C.12/2005/4 (11 August 2005); United Nations Population Fund, *Promoting International Development Through a Cultural Lens* (21 April

In this sense, this thesis does not claim to contain new ideas about the importance of human rights education or the importance of translating human rights norms and principles into language that can be understood by local societies to help individuals to stand up against violations of their human rights. However, this thesis does attempt to develop a theoretical framework that enables us to understand how cultural norms and values can be deployed constructively to promote change and compliance with CEDAW. The theoretical framework will be explained briefly later in this chapter and more fully in Chapter 2. Before doing this, in the following sections I would like to explain the reasons I chose to use Egypt and Tunisia as case studies of how cultural tools and values have been deployed to advance women's status at the legal and social levels. After that, I would like to explain why I chose CEDAW as my specific international human rights instrument for this study.

B. Why Egypt and Tunisia?

Many if not all countries could benefit from cultural change and an improvement in women's human rights. No country completely respects women as equals with men. However, as I have pointed out in the introduction, there are more cultural obstacles in some countries than in others.

I focus on Egypt and Tunisia first because there is an insufficient level of women's equality in these countries. Although both countries have been states parties to CEDAW since the 1980s, Egyptian and Tunisian women still face some degree of discrimination and inequality in law and in everyday life. There are, however, several more specific reasons for my choice of these countries.

First, both Egypt and Tunisia are good case studies for understanding some of the effects of colonialism on women's rights. Egypt has been colonized twice by Western powers. The first colonisation was by France, whose occupation lasted from 1789 until 1801; and the second colonisation was by the British who stayed from 1882 until 1952. Tunisia was colonized by the French from 1881 until 1956. It is not the purpose of this thesis to discuss the history of Egypt and Tunisia during that period. I may

2010) <http://www.unfpa.org/press/promoting-international-development-through-cultural-lens>; Koen De Feyter, 'Localizing Human Rights' (Institute of Development Policy and Management, 2006) <https://core.ac.uk/download/files/153/6698800.pdf>; Ewa Wojkowska, 'Doing Justice: How Informal Justice Systems Can Contribute' (United Nations Development Programme Oslo Governance Center, 2006) <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/EwaWojkowska.pdf>.

refer to it occasionally, but this thesis is not about the history of Egypt and Tunisia. Rather, this thesis mentions the colonial period to give a broad understanding of how the discourse of the women's rights movement and political-religious movements have been influenced by this period.[12]

Ruth Roded argues that the military and materialist power of Western countries that have attacked Middle Eastern countries has raised three types of reactions in Middle Easterners regarding women: conservative, Salafi, and the elite liberal reaction.[13] The first reaction is the reaction of conservatives, who argue, as Roded points out, that the status of women in the Muslim world is not worse than the status of women in the Western world because women in the Muslim world are respected, protected and their dignity preserved in comparison with women in the Western world.[14] Bernard Lewis argues that the issue of women's liberation in the Middle East, more than any other issue, represents the cornerstone of the difference between modernity and westernization in the traditional Middle Eastern conservative and fundamentalist perspectives. Traditional conservatives and fundamentalists accept modern technology originating in the West. This is understood as 'modernity'. Although the technology came from the West, conservatives see it as necessary and beneficial to Muslim countries, especially technologies of war and of propaganda.[15] The question of women's emancipation, as Lewis argues, is in complete contrast with this. Lewis points out that the emancipation of women, in the view of traditional conservatives and fundamentalists, is neither necessary nor useful for Muslim countries. They see it as westernization, as a betrayal of the values of Islam. Accordingly, '[I]t must be kept from entering the body of Islam, and where it has already entered, it must be ruthlessly excised.'[16] Furthermore, as Margot Badran writes: 'a common counterattack on women's assumption of agency as feminists – on behalf of gender and nation – has been to discredit feminists, and feminism, by branding them Western

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[12] In Chapter 4, I will discuss some of postcolonial theorist interpretations of the colonial discourse about women's status in colonized countries, which deployed feminism to insult the Other's culture.

[13] Ruth Roded (ed), *Women in Islam and the Middle East: A Reader* (Tauris & Co, 2nd ed, 2008) 1, 9.

[14] Ibid; see also Lamia Rustum Shehadeh, *The Idea of Women in Fundamentalist Islam* (University Press of Florida, 2003).

[15] Bernard Lewis, *What Went Wrong? The Clash between Islam and Modernity in the Middle East* (Oxford University Press, 2002) 73.

[16] Ibid.

agents of colonialism'.[17] In her explanation of Ghada Hashem Talhami's argument in her book *The Mobilization of Muslim Women in Egypt*, Leila Ahmed writes:

> Critiques of imperialism and the idea of Western superiority were accompanied by critiques of past and contemporary Egyptian intellectuals, including feminists, who, Islamists maintained, had been 'dazzled by the glitter and the glory of European civilization,' and promoted Western ideas and values in part because 'orientalism had succeeded in sowing the spirit of defeatism in Muslim mind by emphasizing all that was negative in the Islamic heritage.' The strategy they used to discredit feminists in particular was that of portraying them as un-Islamic and as culturally Westernized.[18]

A second reaction to colonialism described by Roded is shown in the Salafi movement, which was founded by Jamal al-Afghani (1838–97) and was developed by his student Muhammad Abdu (1849–1905).[19] The Salafi argument is that the teachings of Islam must be derived from the Prophet and the four caliphs, in order to eliminate negative and foreign interpretations of Islam.[20] For example, Muhammad Abdu, as I will discuss in Chapter 4, was the first Muslim religious scholar who re-interpreted the Quranic text on polygamy, which allows men to marry four women.[21] Abdu came to the conclusion that the Quran in fact forbids polygamy because the Quran requires equality and love between wives, and no human being can achieve this; therefore the Quran prohibits polygamy.[22] As I will discuss in Chapter 4, one of the historical turning points of women's rights advocacy in Egypt started after Abdu's engagement in re-interpretation of religious texts for the advancement of women's status in Arabic society. This initiative has influenced subsequent pro-feminist groups and scholars to advocate advancing women's status by deploying religious discourse. Examples of this discussion will be given in chapters 4 and 5.

The third reaction to colonialism is the reaction of the liberal elite, who established the nationalist movements.[23] This third reaction is that Eastern countries should improve the situation of women in their societies based on the Western model, so as

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[17] Margot Badran, *Feminists, Islam, and Nation: Gender and the Making of Modern Egypt* (Princeton University Press, 1995) 24.
[18] Leila Ahmed, *A Quiet Revolution: The Veil's Resurgence, from the Middle East to America* (Yale University Press, 2014) 139; see also Ghada Hashem Talhami, *The Mobilization of Muslim Women in Egypt* (University Press of Florida, 1996) 134.
[19] Roded, above n 13, at 10.
[20] Ibid.
[21] Ibid.
[22] Ibid.
[23] Ibid.

to strengthen their communities to be able to be free from European colonialism.[24] Liberals in the Middle East, especially in Egypt, as Roded argues, express their position on the status of women in the Middle East using a secular vision, but they do not object to the Salafi interpretations of divine texts in favour of women's rights in Islam.[25] Badran points out that, since the emergence of feminism in the Arab world, the secular feminist discourse has engaged some elements of religious discourse.[26] As I will discuss in chapters 4 and 5, pro-feminist scholars and writers such as Rifa'a al-Tahtawi, Muhammed Abdu and Qasim Amin in Egypt and al-Tahir al-Haddad in Tunisia have deployed religious tools and discourse in their arguments for the advancement of women's status. As I will discuss in these chapters, such scholars were social agents who know-how to play in their own fields, in Pierre Bourdieu's sense.[27] These reactions to colonialism are evident in Egypt and Tunisia, making these countries good case studies for considering the complex cultural aspects of promoting human rights.

A second reason for selecting Egypt and Tunisia as case studies, which is related to the first, is that women played an important role in both Egyptian and Tunisian national liberation. Observers of the historical emergence of feminist discourse and women's human rights movement in non-Western countries have noted that it grew out of national liberation and nation building. Kumari Jayawardena in her book *Feminism and Nationalism in the Third World*, which was published in 1986, discussed the national liberation and women's rights movements in Third World countries – Turkey, Egypt, Iran, Afghanistan, India, Sri Lanka, Indonesia, China, Philippines, Vietnam, Korea and Japan – and she came to the conclusion that men were the key players in the national struggle. Male politicians organized the nationalist movements and established the political parties. As Jayawardena argues, these politicians chose specific roles for women to play and did not allow women to

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[24] Ibid.

[25] Ibid.

[26] Margot Badran, 'Locating Feminisms: The Collapse of Secular and Religious Discourses in the Mashriq' (2001) 16(50) *Agenda: Empowering Women for Gender Equity* 41; for a discussion of the relationship between secular and religious feminism see generally Dawn Llewellyn and M Trzebiatowska, 'Secular and Religious Feminisms: A Future of Disconnection?'(2013) 21(3) *Feminist Theology* 244.

[27] In chapter 4, I will explain Pierre Bourdieu's concept of field briefly. I will explain that Bourdieu's concept is useful for understanding the position of these male intellectuals. In addition, drawing upon Bourdieu's concept of field, gives a better explanation of the reasons that made me to choose these male intellectuals in particular, as I will explain this in chapter 4.

exceed those roles. Therefore, women worked under those limitations that were set by male politicians in the national struggle.[28] From this point, Jayawardena argues that women played an important role in the history of the national struggle in Third World countries. However, this role has been ignored by men. The role of women in national liberation has been ignored because men want to be the historical representatives of the national struggle and the makers of history.[29]

Despite these claims about the mobilization of women in the national liberation struggle, women have obtained more space in the public sphere. As chapters 4 and 5 discuss, Egyptian women groups have been granted more space for their advocacy. In Tunisia, women's status has been promoted by the state through reforms to Islamic family law. This advancement was based on the deployment of religious re-interpretations undertaken in order to achieve political objectives to modernize society.

A third reason for choosing Egypt and Tunisia as case studies is that the interests of the state influenced the legislation enacted in favour of women in both countries. The governments of Egypt and Tunisia were not liberal-democratic,[30] and the decisions that were taken by Egypt and Tunisia in enacting legislation to promote the status of women did not come about because of the feminist movements in these countries. The states of Egypt and Tunisia did not generate policies to promote women's status in response to pressure from feminist movements or to pressure from below. Those decisions were a result of the historical conflict between traditional conservatives and their states – a result of a conflict between the interests of the state and of certain social groups.[31] The focal point of this conflict was the reform of Islamic family law. In her analysis of shifts in gender policy in Tunisia, Mounira Charrad points out that 'family law reforms … should be understood within the context of conflicts and

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[28] Kumari Jayawardena, *Feminism and Nationalism in the Third World* (Zed Books, 1986) 260.
[29] Ibid 261.
[30] Helen Rizzo, Adel-Hamid Abdel-Latif and Katherine Meyer, 'The Relationship Between Gender Equality and Democracy: A Comparison of Arab Versus Non-Arab Muslim Societies' (2007) 41(6) *Sociology* 1151.
[31] M M Charrad, 'Policy Shifts: State, Islam, and Gender in Tunisia, 1930s–1990s' (1997) 4(2) *Social Politics* 284; Mounira M Charrad, 'Gender in the Middle East: Islam, State, Agency' (2011) 37(1) *Annual Review of Sociology* 417; for the same discussion about Egypt see Lama Abu-Odeh, 'Modernizing Muslim Family Law: The Case of Egypt' (2004) 37 *Vanderbilt Journal of Transnational Law* 1043; Tamir Moustafa, 'Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt' (2000) 32 *International Journal of Middle East Studies* 3;Tamir Moustafa, 'The Islamist Trend in Egyptian Law' (2010) 3 *Politics and Religion* 610.

alliances among key political actors and not simply as policy output generated by the state in response to pressure from below'.[32] Charrad defined the political actors as the officials and politicians who work in the government as well as the social groups who have the highest stakes in women's oppression. Charrad argues that the social groups who have the upper hand in the oppression of women, at any given time, defend patriarchy as rooted in the traditions of Islamic law and as it represents the Sharia.

Fourthly, both Egypt and Tunisia have strong Islamic political parties that wield considerable influence in both their societies and their governments, such as the Muslim Brotherhood, and others, in Egypt and the Nahda Party, and others, in Tunisia. Therefore, both Egypt and Tunisia have experienced the Islamization of the public field, a factor which makes the recognition of women's rights particularly challenging.

Both Egypt and Tunisia signed CEDAW in the 1980s, as I will discuss in Chapter 6. In this sense, there is a mix of cultural, historical, political, legal and religious conditions in Egypt and Tunisia which make them good case studies.

C. Why CEDAW?

Another preliminary question that needs to be addressed is why I have chosen to look at CEDAW in this thesis, when there are other possible methods for promoting women's human rights. CEDAW was adopted by the United Nations General Assembly on 18 December 1979 and it entered into force on 3 September 1981. In its preamble, CEDAW notes that 'the Charter of the United Nations reaffirms faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women'.[33] It further notes that

> [t]he Universal Declaration of Human Rights affirms the principle of the inadmissibility of discrimination and proclaims that all human beings are born free and equal in dignity and rights and that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, including distinction based on sex.[34]

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[32] Charrad, 'Policy Shifts', above n 31, at 287.
[33] CEDAW preamble [1].
[34] Ibid [2].

On the basis of this, all states parties to 'the International Covenants on Human Rights have the obligation to ensure the equal rights of men and women to enjoy all economic, social, cultural, civil and political rights'.[35]

Heather Monasky points out that CEDAW attempts to promote women's human rights through three protocols: '(1) substantive equality; (2) non-discrimination; and (3) state obligation'.[36] In this sense, CEDAW imposes obligations on states parties to eliminate all discrimination against women in order to ensure the legal and substantive equality of women. As Francis Raday points out, CEDAW's main goal is to eliminate discrimination against women and it 'does not assume a guise of gender neutrality'[37] because it aims 'for transformative and not merely formal equality'.[38] Raday further points out that formal equality 'is achieved if policies are merely gender neutral, while substantive equality is concerned with the effects of equality policies and takes into account the need to correct prevailing inequality'.[39]

CEDAW's article 2(e) indicates that states parties are obliged to take all appropriate measures to eliminate discrimination by 'any person, organization, or enterprise'. Jennifer Hainfurther points out that CEDAW does not only oblige states parties to eliminate discrimination against women through changing their national laws; it also obliges states parties to protect the equality of women from private actors.[40] CEDAW's article 2 will be discussed in more detail in Chapter 8 and there will be more discussion about CEDAW in general in Chapter 6.

The preamble to CEDAW states that 'a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality between men and women'.[41] Raday points out that 'CEDAW is consonant with a core concept of feminism' because 'CEDAW's tools for addressing cultural, social, and economic intersectional differences between women are offshoots of the core right to

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[35] Ibid [3].
[36] Heather Monasky, 'What's Law Got to do with it? An Overview of CEDAW's Treatment of Violence against Women and Girls through Case Studies' (2014) 6(1) *Michigan State Law Review* 327, 333.
[37] Frances Raday, 'Gender and Democratic Citizenship: The Impact of CEDAW' (2012) 10(2) *International Journal of Constitutional Law* 512, 512.
[38] Ibid 515.
[39] Ibid.
[40] Jennifer S Hainfurther, 'A Rights-Based Approach: Using CEDAW to Protect the Human Rights of Migrant Workers' (2009) 24 *American University International Law Review* 834, 875.
[41] CEDAW preamble [14].

equality and are not a vehicle for the fragmentation of it'.[42] Feminism and article 5(a) will be discussed later in this chapter; the relationship between CEDAW and feminism and article 5(a) will be discussed in Chapter 7. Article 5(a) provides that:

> States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

The importance of article 5(a) derives from the crucial role that culture plays in establishing women's human rights in the context of state and society. The CEDAW Committee thus recognized that, despite the efforts states parties had made towards the achievement of legal equality for women, 'true advancement towards equality requires fundamental social and cultural change'.[43] Elizabeth Sepper indicates that article 5(a) has two roles: an interpretive and a substantive role. In its interpretive role, it requires states parties to look beyond legislative reforms in order to achieve cultural change.[44] In its substantive role, it looks at areas that have not been covered by the other provisions of CEDAW. Article 5(a) will be discussed in more detail in Chapter 7. I focus on article 5(a) because, as I will discuss in Chapter 7, the main barrier that the Egyptian and Tunisian governments have faced in their attempts to apply the principles of CEDAW is their culture.[45]

Given this background, I have chosen to discuss CEDAW in this thesis for two reasons. The first reason is that CEDAW is a critical instrument for the promotion of women's human rights. The achievement of women's human rights is a cornerstone for states' economic, legal and social development. Women's human rights can be considered the crossing point between the political, legal, religious and socio-cultural fields. Understanding how CEDAW's provisions can be placed in the local context and how they can enable cultural change may also give a better understanding of how

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[42] Raday, above n 37 at 516.

[43] Division for the Advancement of Women, Department of Economic and Social Affairs, United Nations, *Assessing the Status of Women: A Guide to Reporting Under the Convention on the Elimination of All Forms of Discrimination Against Women* (United Nations, 2000) 17.

[44] Elizabeth Sepper, 'Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns Under the Women's Discrimination Treaty' (2008) 30(2) *University of Pennsylvania Journal of International Law* 585, 597.

[45] Culture has not only been identified as a relevant consideration by Egypt and Tunisia. The CEDAW Committee refers to culture for its interpretation of the majority of CEDAW's articles. As Sepper indicates, 'Article 5(a) gives the Committee the flexibility to interpret CEDAW in an evolutionary way, identifying negative patterns and stereotypes as they emerge'. Ibid 609.

other human rights issues can be promoted. In this sense, the application of CEDAW is not only beneficial to women; it is beneficial to men as well. Kavita Ramadas and Kathleen Kelly Janus point out that 'CEDAW helps all human beings, regardless of their sex (or other distinguishing physical characteristics), achieve their inalienable rights of life, liberty, bodily integrity, and dignity'.[46]

The second reason for looking at CEDAW in this thesis is that CEDAW obliges states parties to work on the achievement of formal and substantive equality of women. It does not only encourage states parties to protect women's equality in the public sphere or in legal form; it also obliges states parties to take all appropriate measures to protect women's equality in the private sphere and everyday life. This is because of the broad definition of discrimination provided by article 1 of CEDAW, namely 'any distinction, exclusion or restriction made on the basis of sex'. In this sense, discrimination against women cannot be considered only a question of law, but also as part of everyday life. This will be discussed in more detail in Chapter 8, where I discuss CEDAW's article 2.

II. Theoretical framework: the background-vernacularist approach

The background-vernacularist approach is used in this thesis as a theoretical framework to understand what happened in Egypt and Tunisia before they became signatories to CEDAW. As I will explain in Chapters 4 and 5, we can see examples of people working to change the cultural background in the works of some Egyptian and Tunisian intellectuals who in the past argued for women's rights.

The background-vernacularist approach is based on Susan Hekman's background approach to enable and promote social change and to resist masculinity and women's oppression, and Sally Engle Merry's vernacularist approach to the application of human rights norms and principles in the local context.[47] This thesis attempts to incorporate these two approaches with each other in order to propose a possible framework for the application of CEDAW in Egypt and Tunisia. I will argue that the success of this strategy also depends on the willingness of the states parties to CEDAW to achieve women's equality, a matter which will be discussed later in this

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[46] Kavita N Ramadas and Kathleen Kelly Janus, 'Ratifying Women's Rights' (2011) 196(Oct/Nov) *Policy Review* 29, 31.
[47] Hekman, *Future of Differences*, above n 9; Merry, above n 9.

chapter and in Chapter 8. This approach will be effective as a long-term strategy if states parties take seriously the achievement of women's equality and social justice, by focusing on the legal and substantive application of CEDAW. A brief explanation of Hekman's and Merry's approaches follows; they will be discussed comprehensively in Chapter 2.

A. *Feminist background approach*

In her revision of Audre Lorde's dictum: 'the master's tools will never dismantle the master's house',[48] Susan Hekman suggested that *only* the master's tools can dismantle the master's house. For Hekman, the master's house is the background of social meanings that constitute the inferior status of women. To flesh out her argument, Hekman drew upon the arguments of non-feminist background theorists such as Ludwig Wittgenstein, John Searle, Pierre Bourdieu, Michel Foucault and others; this prior work on the background will be explained more fully in Chapter 2. Hekman points out that the background theorists were preoccupied by their belief in the intelligibility of human 'common understandings'.[49] They believed that human social life would not be possible without 'a core of agreed-upon assumptions about both the social and natural worlds'.[50]

Hekman points out that background theories suggest that there is a non-foundational foundation of knowledge, which in turns offers 'a viable epistemological alternative to two equally unacceptable positions: absolutism and nihilism'.[51] In this sense, the background for Hekman does not only determine the '*possibility of intelligibility but*

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[48] Audre Lorde writes:
> Those of us who stand outside the circle of the society's definition of acceptable women; those of us who have been forged in the crucibles of difference – those of us who are poor, who are lesbians, who are Black, who are older – know that *survival is not an academic skill*. It is learning how to stand alone, unpopular and sometimes reviled, and how to make common cause with those others identified as outside the structures in order to define and seek a world in which we can all flourish. It is learning how to take our differences and make them strengths. *For the master's tools will never dismantle the master's house*. They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change.

Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press, 1984) 112.
[49] Hekman, *Future of Differences*, above n 9, 122.
[50] Ibid.
[51] Ibid. In essence, a non-foundational foundation avoids both an absolute foundation and no foundation to knowledge. Hekman points out that the background theorists 'effectively displace this binary by asserting a non-foundational foundation. They define a set of fundamental beliefs that are not absolute; these beliefs vary among societies and change over time within societies. Yet these beliefs provide a secure foundation for meaning and understanding; they produce not nihilism, but the very possibility of intelligibility.' Ibid 22. Chapter 2 will discuss this further.

also the possibility of changing the ground of that intelligibility'.[52] Hekman asserts that 'only by understanding the workings of the background can feminists develop strategies for changing it, that is, for constructing a social reality that breaks the bonds of masculinist domination'.[53] Hekman's mission is thus to provide 'important guidelines for a feminist theory of the Background'.[54] Hekman's argument and her suggestions for changing the background of social meanings will be discussed in more detail in Chapter 2.

B. The vernacularist approach

Governments frequently cite the persistence of cultural and social norms to explain their failure to achieve gender equality. Therefore scholars of international law and international relations and legal feminists need to find ways to overcome these barriers. Sally Engle Merry is one scholar who has attempted to find a way to apply human rights treaties by overcoming cultural barriers. What Merry suggests is the vernacularization of human rights norms. Merry argues that human rights norms and principles can only be effective if they are translated into local or vernacular terms.[55]

Merry's argument for the vernacularization of human rights norms and principles relies on 'the role of activists who serve as intermediaries between different sets of cultural understandings of gender, violence, and justice'.[56] The position of activists described by Merry will be considered in this thesis as a hybrid position or in-between space, which will be discussed in more detail in Chapter 3.

Merry argues that human rights norms should be taken from a universalist discourse to be adopted into the local language, much like a translation. However, this translation, as Merry points out, does not require that the basic meanings of human rights norms should be changed.[57] Merry insists that translation does not mean transformation. Basic norms of human rights remain part of the modernist view of social justice, which emphasises independence, choice, equality and integrity. Furthermore, Merry holds the state responsible for establishing these conditions for an

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[52] Ibid (emphasis added).
[53] Ibid 429.
[54] Ibid 435.
[55] Merry, above n 9.
[56] Ibid 2.
[57] Ibid.

individual's life in order to enable them to seek their legal rights from the government. Merry also points out that whether the vernacularization strategy has an influence on the elimination of violence against women or on achieving social equality may be considered an open question. [58] Merry's explanation of vernacularization will also be discussed in more detail in Chapter 2.

C. Contribution

On the basis of the approaches of Hekman and Merry, this thesis proposes a background-vernacularist approach. This approach is about *both* changing the cultural background and vernacularizing human rights. It is used in this thesis as a theoretical analysis of certain historical interventions in women's rights, as well as as a possible strategy for promoting compliance with CEDAW.

The approach I offer is a theoretical analysis which reads and interprets arguments and interventions in favour of women's rights in some existing literature and history. For example, through the lens of the background-vernacularist approach, in Chapter 2 this thesis re-reads and re-interprets several works of Islamic feminism. In addition, it re-reads and re-interprets the arguments of some Egyptian and Tunisian intellectuals who argued for women's rights in the nineteenth century. The purpose of re-reading and re-interpreting such arguments through the lens of the background-vernacularist approach is twofold.

First, I attempt to show how cultural norms and values have been deployed in the women's rights discourse in Egypt and Tunisia. This is an attempt to show that interventions, actions or arguments have been used in the past which were likely to change or challenge the cultural background, on the one hand, or to vernacularize some external concepts of women's rights, on the other. However, this does not suggest that these early activists and intellectuals were using what I have termed a background-vernacularist approach, because they did not theorize or understand their interventions in these terms. But they were in effect using cultural values either in an attempt to change the background, in Hekman's sense, or in order to vernacularize women's rights norms, in Engle Merry's sense.

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[58] Ibid 221.

Second, I argue that the language of the background-vernacularist approach provides a better understanding of how hybrid discourse, that is, discourse which mixes elements of two or more cultures, operates. This is relevant here because I am using what are essentially Western theoretical methods to read or to understand certain interventions or arguments that have been made in Egyptian or Tunisian history. Despite the fact that I am not Egyptian or Tunisian as well as the fact that I am standing outside both Western and those other histories, this approach locates me in a hybrid position.

For example, when I present the arguments of Islamic feminism and other Arab intellectuals who argue for women's rights based on religious discourse through the lens of the background-vernacularist approach, I take a position in-between several discourses. This is because I deploy the language of the background-vernacularist approach, which is a feminist, legal, anthropological and human rights language, to describe how cultural tools and values have been deployed in the Arab-Islamic context to promote women's status.

Without the deployment of the background-vernacularist approach as a theoretical analysis, many efforts made by Islamic feminists and Arab intellectuals and even social forces that advocate women's equality may not be appreciated or understood as appropriate strategies.

In addition to providing a particular lens through which to understand the past contributions of certain scholars, the background-vernacularist approach also enables a focused re-reading of more recent materials, including the national reports submitted to the CEDAW Committee, constructive dialogues between the CEDAW Committee and states' delegations, and the CEDAW Committee's observations and concluding recommendations. In particular, the thesis asks the following question:

- Do the Egyptian and Tunisian national reports submitted to the CEDAW Committee, or constructive dialogues between the CEDAW Committee and the Egyptian and Tunisian delegations, include explicit information about the work the state has done to study how the cultural background of negative cultural norms and practices can be challenged or changed and replaced by human rights norms and principles?

D. *Using cultural tools to occupy a hybrid position*

The background-vernacularist approach provides a way of thinking about the hybrid position occupied by cultural mediators; I will explain the concept of hybridity in Chapter 3. In relation to human rights, cultural mediators take on a new way of thinking about culture, defining its concepts and principles. Along with members of the local community and human rights networks, they experiment with new cultural concepts, without leaving behind the old concepts and principles. In a sense, they experiment with new forms, and see how it goes. They engage in rational dialogue based on investigating and shifting the old concepts so that they are more appropriate for human rights discourse. This type of encounter with cultural concepts and principles reflects the 'background' approach to cultural change. Drawing upon feminist theorist Susan Hekman's discussion, each cultural concept that frames a contradiction of or resistance to human rights norms and principles should be critiqued. It should be brought into focus; then it should be examined; then its implications should be investigated. This process will be discussed in more detail in Chapter 2. When those processes are completed, another story can replace the existing story in order to allow change in the background knowledge. The problem with the concept of the background, as Hekman identified, is that it is a conservative concept.[59] It can be argued further that deploying an approach which relies on changing the cultural background will move at a very slow pace. However, as I will argue in Chapter 2, it can be an effective and subversive method. The people promoting this process would ideally be in a hybrid position, which allows them to mediate between two different cultural discourses: the human rights culture and local culture; this will be discussed in Chapter 3, and examples of such people will be discussed in chapters 4 and 5.[60]

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[59] Hekman writes: '[O]n its face, the Background is a conservative concept. It presumes that meaning rests on something like tradition – the set of meanings handed down to us from our forefathers (not, significantly, our foremothers).' However, as Hekman points out, 'despite its conservative heritage', the theory of the background can be deployed as an oppositional theory to the dominant theories and discourse and it can be directed to feminist discourse. See Susan Hekman, 'Backgrounds and Riverbeds: Feminist Reflections' (1999) 25(2) *Feminist Studies* 427, 435.

[60] It should be noted that as long as a cultural mediator is aware of human rights norms and principles, they could be situated within a particular culture – this is because cultures are always diverse and internally contradictory and there is always room for promoting some aspects of a culture, which I will discuss in Chapter 8, which accord more with human rights while trying to downplay elements of a culture which do not accord with human rights. This is shown by grassroots women's movements in

This thesis relies on two further points to argue for the effectiveness of deploying cultural tools and values to promote women's human rights through the background-vernacularist approach. The first point is that the background-vernacularist approach is not prescriptive. It can include multiple methodologies for promoting change, and does not require a consistent or single approach to change. My argument is that one has to select a methodology appropriate to a particular situation and discourse. Such methodologies are flexible as long as the chosen methodology enables the change or at least challenges the background of social meanings, and as long as the concepts of the chosen methodology are understandable and acceptable when they are placed in the local discourse. This is explained further in Chapter 2.

The second point is that this thesis presumes the main objectives of feminism. Feminist theories have much to do with explaining the obstacles to the equality of women and the possible strategies that would enable this equality to be achieved. Although not all feminist theories agree on the efficiency of the international human rights system or the legal system as the main source of women's equality, feminist theories have provided substantial arguments for equality and proposed various strategies to achieve equality. Anne Philips points out that feminism is essentially about change, and 'challenges the existing pattern of relations between the sexes, wherever these are characterized by subordination and inequality'.[61] In the pursuit of their long-term goals, as Philips argues, feminists have 'pursued different priorities and disagreed over short-term strategies'.[62] In this sense, although feminists may have many disagreements about how gender equality can be achieved, they share an interest in any strategies or arguments that might enable gender equality.

It might be useful here, however, to discuss feminism briefly. Briefly explaining the main elements of feminism in the following section may be useful to understand how the deployment of cultural tools could be acceptable from a feminist perspective in pursuit of legal and substantive gender equality.

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many countries. A 'mediator' is only a person who is open to different perspectives and has the skills to bring out the best outcome through dialogue.
[61] Anne Philips, *Gender and Culture* (Polity, 2010) 16.
[62] Ibid.

III. Feminism

Before CEDAW was adopted, feminist theories had emphasised that women have been oppressed and discriminated against by both the social order and by official laws. Such theories pay particular attention to several main problems: patriarchy, oppression of women, the feminine–masculine dichotomy, and the dichotomy of private and public spheres.[63] These main points enabled feminist theorists to understand the nature of women's oppression and why women's status has been inferior throughout history. By first understanding the nature of the problem, feminists could then propose different strategies and arguments to challenge these problematic elements. Although there was diversity among feminist theories, they agreed on two connected issues: the need for social change in order to improve the situation of women and women's empowerment.[64] Social change and women's empowerment are the main goals that feminists argue for, despite their different approaches to what these goals consist of, and how they can be achieved. This section briefly discusses the definition of feminism. Feminism is a body of thought that argues for equality and provides some guidance on how to promote it. It is important to look at CEDAW in this broad context, even though feminism itself is so diverse.

A. Definition of feminism

It might be thought that examining current feminist discourse would make it reasonably simple to provide an answer to the question of 'what is feminism?' This thesis does not provide a definitive answer to this question since, first, it is not necessary to the argument I want to make and second, because the diversity of feminism makes it difficult to propose one definition.[65] Marianne Hirsch and Evelyn Fox Keller argue that building feminist theory is difficult because of the conflicts and differences between feminists.[66] Feminism encompasses different directions and approaches. Therefore, even if it seems that the diversity of the feminist approaches and directions can be seen as 'a more productive theoretical and political category

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[63] Susan J Hekman, *Gender and Knowledge: Elements of a Postmodern Feminism* (Northeastern University Press, 1990); Alison M Jaggar, *Feminist Politics and Human Nature* (Rowman & Allanheld, 1983).
[64] Hekman, *Future of Differences*, above n 9.
[65] Rosalind Delmar, 'What is Feminism? in Nancy F Cott, Juliet Mitchell and Ann Oakley (eds), *What is Feminism?* (Pantheon Books, 1986) 8, 9.
[66] Marianne Hirsch and Evelyn Fox Keller, *Conflicts in Feminism* (Routledge, 1990) 1, 3.

than either universalizing consensus',[67] this diversity has divided feminists into 'separate camps'.[68] It is beyond the scope of this chapter to discuss the many different taxonomies of feminism. But it might nonetheless be useful to highlight some general definitions that attempt to make sense of what feminism is.

Margaret Davies defines feminism as 'a political agenda which can be reasonably broadly and uncontroversially defined insofar as it has as its aim a social and political environment in which women and men of all ethnicities, class backgrounds, sexualities, and abilities are equally valued and empowered'.[69] bell hooks defines feminism as 'a movement to end sexism, sexist exploitation, and oppression'.[70] hooks explains that she 'liked this definition because it did not imply that men were the enemy'.[71] By naming 'sexism as the problem it went directly to the heart of the matter'. In this sense, for hooks, to understand feminism 'one has to necessarily understand sexism'.[72] Sally Scholz notes that

> feminism isn't *just* about equal rights for women. *Feminism is a critical project*. It looks at all aspects of life to identify those elements that might be oppressive and suggests alternatives … Feminism, in other words, follows the critical project with action to bring about social change.[73]

This can be understood clearly through Alison Jaggar's argument.[74] Jaggar argues that scholars of feminism are distinguished from other scholars by their aim and 'common political interest in ending women's oppression, and they see their scholarly work as contributing to a comprehensive understanding of how women's liberation should be achieved'.[75] Jaggar's definition of feminism is about ending the oppression of women and giving a clear understanding of the methods that might achieve the liberation of women. Jaggar suggests that feminist theorists 'must draw on scientific knowledge to give substance to their ideas, to discover the causes of women's past and present oppression and to identify workable strategies for ending that oppression'.[76]

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[67] Ibid 4.
[68] Ibid.
[69] Margaret Davies, *Asking the Law Question* (Thomson LawBook Co, 3rd ed, 2008) 220.
[70] bell hooks, *Feminism is For Everybody: Passionate Politics* (South End Press, 2000) 1.
[71] Ibid.
[72] Ibid.
[73] Sally J Scholz, *Feminism: A Beginner's Guide* (One World, 2010) 1. Emphasis in original
[74] Jaggar, above n 63 at 36.
[75] Ibid 353–4.
[76] Ibid 354.

In the context of Arab-Islamic countries which are my central concern in this thesis, Badran points out that at 'its most abstract level feminism is an analytical discourse – a diagnostic and corrective discourse – which takes as its central concern women and how they have not fared well under patriarchal systems'.[77] In this sense, as Badran argues, it is not necessary to adhere to one school of feminism or to subscribe to all feminist schools. Most importantly, Badran points out that anti-feminist commentators such as some Islamist critics fail to treat feminism as 'an analytical enterprise'. Such Islamist critics frequently take specific forms or arguments of feminism 'for the "whole" or take the particular brand of feminism of certain leading feminist proponents as constituting feminism *per se*'.[78] In this sense, Badran finds it important to come up with an appropriate definition of feminism to occupy a place in the Arab-Islamic context.

Badran and Mariam Cook have developed a definition of feminism that they argue is appropriate and useful for the Arab-Islamic context. This definition has three levels. The first level is an awareness of the constraints placed upon women. The second level is a refusal or rejection of such limitations upon women. The third level consists of efforts to construct a more gender equitable system. In this sense, as Badran argues, women in Middle Eastern countries 'can and have worked within various systems of thought and belief'. At same time, as Badran argues, Middle Eastern women work 'within multiple and intersecting ideological frames'. In this manner, 'certain feminists have operated within discourses of secular nationalism or Islamic discourses, and/or have made feminist articulations within both discourses at once'.[79]

As discussed above, there is no agreement on one definition of feminism. It appears that feminism can be defined as a political, socio-cultural, legal or epistemological project that tries to find out the appropriate means and ways to understand the causes of women's oppression and their subordination to men and to eliminate it.

Feminism enables us to be aware of what it means to be marginalized and oppressed; and how the marginalization and oppression can be hidden in our cultural practices,

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[77] Badran, 'Locating Feminisms', above n 26, 43.
[78] Ibid
[79] Ibid.

social interactions, and our discourse in our everyday experiences.[80] Feminism has unmasked the social injustice experienced by women and the male bias in law, even in the international human rights system. Feminism has also unmasked the fiction of neutrality in law and judgment.[81]

But feminist theories have done more than that. They have provided the tools, terms and methods to unmask such socially disadvantaged positions by raising consciousness about them and suggesting strategies to change them legally, politically and socially.[82] Although these theories concentrate on women, I believe that they are more than that.[83] Their terms, methods and tools can be deployed in favour of minorities, and oppressed, marginalized and disadvantaged people (men and women) anywhere in the world.[84] The important thing that we can learn from feminist theories is the importance of discourse in the terms of power and resistance.[85] They teach us that the dominant discourse can shape people's thinking about each other. So, use of

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[80] Sandra G Harding, *The Feminist Standpoint Theory Reader: Intellectual and Political Controversies* (Psychology Press, 2004).

[81] Rosemary Hunter, Clare McGlynn and Erika Rackly (eds), *Feminist Judgments: From Theory to Practice* (Bloomsbury Publishing, 2010).

[82] Jaggar, above n 63.

[83] bell hooks defines feminism as 'a movement to end sexism, sexist exploitation, and oppression … I liked this definition because it did not imply that men were the enemy. By naming sexism as the problem it went directly to the heart of the matter … To understand feminism it implies one has to necessarily understand sexism.' hooks, above n 70, 1.

[84] Therefore, my understanding of feminism is broader than hooks' definition, above n 70. It does not only aim to end sexism. But, also, it aims to end inequality and social injustice for all human beings. My understanding is closer to Gloria Steinem's definition of a feminist: 'A feminist is anyone who recognizes the equality and full humanity of women and men.' See Birute Regine, *Iron Butterflies: Women Transforming Themselves and the World* (Prometheus Books, 2010) 70, 73. To understand how feminist methods and tools are applicable for any disadvantaged people regardless of their gender and ethnic group, see for example the interesting discussion by Mary Hawkesworth. Drawing upon the idea that feminist standpoint theory could be useful as an analytical tool rather than an epistemological doctrine because it takes into account multiple perspectives, Hawkesworth compared 'accounts of two aspects of backlash – recent [in 1990s in the United States of America] proposals to abolish affirmative action and "reform" welfare – advanced by conservative women, liberal feminist, socialist feminists, black feminists, and a postmodernist feminist.' Mary Hawkesworth, 'Analyzing Backlash: Feminist Standpoint Theory as Analytical Tool' (1999) 22(2) *Women's Studies International Forum* 135. Furthermore, in his discussion of 'the reflexive-materialist method of doing sociology' proposed by the sociologist feminist Dorothy E Smith, George Smith points out that, although 'the social organization of her methods starts from and thus takes up the standpoint of women, its ontology and epistemology intends a science of society rather than a form of ideological practice'. Therefore, according to Smith, her method is not limited to the standards of feminist research. Rather, it can 'be used by all individuals who stand outside political administrative *regimes* intent on managing society.' George W Smith, 'Political Activists as Ethnographer' (1990) 37(4) *Social Problems* 629, 631.

[85] Susan Hekman (ed), *Feminist Interpretations of Michel Foucault* (Penn State Press, 2010); Sara Mills, *Discourse* (Routledge, 2006); Terry Threadgold, *Feminist Poetics: Performance, Histories* (Routledge, 2002); Maria Drakopoulou, 'Feminism, Governmentality and the Politics of Legal Reform' (2008) 17(1) *Griffith Law Review* 330.

discourse can be a deconstructive or a constructive tool that can be used to oppress or free people.

For the purpose of this thesis, feminism can be considered one of the social, political and legal theories that aims to achieve gender equality. This is close to Gloria Steinem's definition of a feminist: 'A feminist is anyone who recognizes the equality and full humanity of women and men.'[86]

B.   *Feminists' deployment of cultural tools*

Promoting social justice norms and principles by deploying culturally-informed methods for achieving change tools is a familiar idea in feminist discourse which can be observed in the history of Western feminist activism and theory.[87] The wider views about patriarchy and women's oppression in society were understood by early feminist discourse within the traditional concepts of liberalism. These concepts included a focus on equality, autonomy, freedom of choice, freedom of belief, rationality and individualism. Such values are historically important and were used in early feminist arguments. This is why feminism is indebted to the tradition of liberalism.[88]

Liberal feminist theorists like John Stuart Mill, Mary Wollstonecraft (1759–1797) and Olympes de Gouges (1748–1793) saw that general liberal principles established the foundation of the rights of women. They used a range of arguments to find a place for women's rights through deploying these principles. Liberal principles like rationality, autonomy, individualism and freedom of choice have been used comprehensively in liberal feminist discourse to demand the rights to education, to choose one's spouse, and achieve votes for women.[89] When women were excluded from the French Declaration of the Rights of Man after the French Revolution, de Gouges wrote a similar declaration for women in her *The Declaration of the Rights of Women and Citizens*. De Gouges departed from the traditional thinking about rights because she

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[86] Quoted in Regine, above n 84 at 73.
[87] Jaggar, above n 63 at 27.
[88] Ibid.
[89] Ibid 27–39.

incorporated something that was strange and unfamiliar at that time.[90] Likewise, in Britain, Wollstonecraft wrote *A Vindication of the Rights of Women* in 1792, which defended women's rights to education and to choose their spouse.[91] Wollstonecraft, like Mill, challenged the dichotomy of the rational–irrational natures of men and women by demanding the education of women. She deployed the liberal principle of rationality to ask for something that was new in that era. She challenged it by attributing the supposed irrationality of women to their lack of education.[92] This argument can also be seen clearly in Mill and Taylor's works where they argued that the education of women is important.[93] Like Wollstonecraft, Mill attributed the cultural inferiority of women to their exhausting work in the house and their husbands denying them choices.

Thus, although liberal feminist discourse built on the traditional concepts of liberalism, it has also challenged it. Terms such as 'feminism', women's rights and women's equality, however, did not come into regular use until after the start of the second wave of feminism in the 1960s and 1970s.[94] The second wave was started by a publication by Simone de Beauvoir, *The Second Sex,* in 1949 followed by Betty Friedan's *The Feminine Mystique* in 1963, then Kate Millet's *Sexual Politics* in 1969.[95] The popular dictum of Beauvoir that 'One is not born, but rather becomes, a woman' established the feminist framework.[96] Prior to this, during the first wave of feminism, women's rights were seen as suffrage rights, women's right to education and the rights of women in marriage.[97] So, arguments about women's rights, equality

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[90] Hannelore Schröder, 'The Declaration of Human and Civil Rights for Women (Paris, 1791) by Olympe de Gouges' (1989) 11 *History of European Ideas* 263; Joan Wallach Scott, *Only Paradoxes to Offer: French Feminists and the Rights of Man* (Harvard University Press, 1996) 19–30.

[91] R M Janes, 'On the Reception of Mary Wollstonecraft's A Vindication of the Rights of Woman' (1978) 39(2) *Journal of the History of Ideas* 293.

[92] Ruth Abbey, 'Back to the Future: Marriage as Friendship in the Thought of Mary Wollstonecraft' (1999) 14(3) *Hypatia* 78; Maria H Morales, *Perfect Equality: John Stuart Mill on Well-Constituted Communities* (Rowman & Littlefield, 1996) 36.

[93] Harriet Hardy Taylor Mill, *Enfranchisement of Women: An Essay by Mrs John Stuart Mill* (Woman's Suffrage Association, 1868); John Stuart Mill, *The Subjection of Women* (Longmans, Green, Reader, and Dyer, 1869).

[94] Joanne Hollows, *Feminism, Femininity, and Popular Culture* (Manchester University Press, 2000).

[95] Constance Backhouse and David H Flaherty, *Challenging Times: The Women's Movement in Canada and the United States* (McGill-Queen's University Press, 1992).

[96] Susan J Hekman, *The Feminine Subject* (John Wiley & Sons, 2014).

[97] Susan Moller Okin, 'Feminism, Women's Human Rights, and Cultural Differences' (1998) 13(2) *Hypatia* 32, 42.

and independence gained some popularity.[98] Such arguments became one of the most notable discourses of the twentieth century as a theory and practice.[99]

Starting from this, feminist discourse has found a new place in Western cultures, but also across the globe. In its historical development, it has started to change from an elite body of literature to become the predominant discourse for all aspects of women's freedom and equality.[100] Feminist discourse has been effective for activists and theorists on behalf of women as individuals and groups, and many gendered legislative reforms nationally and internationally have been influenced by feminist discourse. Most importantly for this thesis, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Committee on the Elimination of Discrimination against Women were the result of much feminist discourse and activism.[101]

IV. The boundaries of this thesis

In discussing the background-vernacularist approach as an appropriate theoretical framework for analysis and strategy to promote cultural change and vernacularize women's human rights through the deployment of cultural values and tools in Egypt and Tunisia, this thesis has several limitations. First of all, it does not address the current situation of women's human rights in Egypt and Tunisia. In other words, this thesis does not discuss the progress in women's human rights during and after the Arab Spring. Although there will be occasional references to women's human rights issues in the present day, the case studies in this thesis will focus on two points. Firstly, they will focus on the early history of the intellectual movements that prepared some of the ground for the emergence of Egyptian and Tunisian feminism. This discussion is limited to the period before Egypt and Tunisia became signatories to CEDAW in the 1980s and will take place in chapters 4 and 5. Secondly, this thesis will focus on the official reports submitted by Egypt and Tunisia to the CEDAW

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[98] Jean Grimshaw, *Philosophy and Feminist Thinking* (University of Minnesota Press, 1986). Grimshaw argued that the main elements that enabled the emergence of feminist thought were the Industrial Revolution and the rise of equalitarian thought.
[99] Davies, above n 69 at 220; see also E Ermarth, 'What Counts as Feminist Theory?' (2000) 1(1) *Feminist Theory* 113.
[100] Davies, above n 69 at 215–220.
[101] Doris Buss and Ambreena Manji, 'Introduction' in Doris Buss and Ambreena Manji (eds), *International Law: Modern Feminist Approaches* (Hart Publishing, 2005) 1.

Committee before the Arab Spring. These reports will be discussed in chapters 6 and 7. Many of the reports and arguments discussed in this thesis pre-date the Arab Spring. This is because the main purpose of this thesis is to develop a set of arguments about the different methods adopted by Egypt and Tunisia to promote women's human rights. In other words, this thesis attempts to show that appropriate cultural values and tools have been deployed to some degree in Egypt and Tunisia either before they became signatories to CEDAW or in withdrawing their reservations to some articles of CEDAW. I am introducing these arguments to support the main argument of this thesis, which is that, although it was not known or theorized as such, the background-vernacularist approach has already been partially used in Egyptian and Tunisian legal and social contexts to promote women's human rights. In addition, these arguments show that such an approach can be useful as a long-term strategy to promote women's human rights and compliance with CEDAW if states parties are willing to do so.

A second limitation is that this thesis does not attempt to discuss the relationship between women's human rights and democracy. As discussed previously, this thesis suggests that the background-vernacularist approach is a possible strategy to promote compliance with CEDAW and its norms and principles. Hence, despite the fact that this approach can be considered a socio-cultural approach, it cannot be self-sufficient because it needs to be accompanied by the statist approach or politico-legal approach, as I will discuss in Chapter 7. In this sense, the background-vernacularist approach is an appropriate strategy in both democratic and non-democratic contexts. Although democracy is important for the promotion of women's human rights, the possibility of developing women's human rights should not be limited to the democratic context.[102] Investigation of historical intellectual movements and some historical turning points in gendered legislative reforms in Egypt and Tunisia, as discussed in chapters 4 and 5, shows that women's status has been promoted to some degree under authoritarian regimes. For example, Chapter 5 shows that, although Tunisia was an authoritarian regime, it enabled the progress of women's human rights to take place in the Tunisian

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[102] For a discussion that gives human rights more priority than democracy see Mahmood Monshipouri and Claude Emerson Welch, 'The Search for International Human Rights and Justice: Coming to Terms With the New Global Realities' (2001) 23 *Human Rights Quarterly* 370. For an interesting discussion of the importance of the relationship between human rights and democracy see Anthony J Langlois, 'Human Rights without Democracy? A Critique of the Separationist Thesis' (2003) 25 *Human Rights Quarterly* 990.

legal context. Although Tunisian women have not achieved full legal equality yet, let alone full substantive equality, Tunisia is still in the forefront of Arab countries in progress on women's human rights. This will be discussed in more detail in Chapter 5. A second reason for considering women's human rights in non-democratic contexts is that, as Frances Raday points out, gender equality should be understood as 'a condition-precedent for democracy and not merely a result of democratic recognition'.[103] She adds that 'women are entitled as individuals to equality, whatever the majority's expressed will to the contrary'.[104]

A third limitation of the thesis is that, although the background-vernacularist approach presented in this thesis can be considered an approach that links theory with practice, this thesis does not attempt to undertake or significantly discuss the 'practice' involved. It does not, for instance, discuss the very significant role played by non-governmental organizations and human rights activists in Egypt and Tunisia. Nor does it specifically attempt to apply the background-vernacularist approach to CEDAW's articles. This is because it is hard to form in general terms a reasoned explanation about the process and norms associated with changing the background of cultural norms and at same time vernacularizing CEDAW's articles. Applying the background-vernacularist approach may require extensive and very specific explanation and investigation of religious texts and their interpretation, literature, history, vernacular language, national laws and cultural practices. It is beyond the scope of this thesis to do this because workshop sessions, symposiums and more research are required to challenge the background of negative cultural norms and to replace them with norms based on CEDAW. This work can be done better by states, governmental or non-governmental organizations, or at least by social groups sympathetic to women's human rights. Chapter 2 will explain this further. In this sense, I am simply developing a theoretical argument about feminist strategy, and using some historical discussion and case analysis to illustrate it.

A fourth limitation, and relatedly, is that this thesis does not attempt to give an explanation of what women's human rights status would be in Egypt and Tunisia if the background-vernacularist approach were applied. This is because it is not easy to

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[103] Raday, above n 37, 515.
[104] Ibid.

predict what the impact of the background-vernacularist approach would actually be on women's status. Rather, this thesis attempts to show through the lens of the background-vernacularist approach that some Egyptian and Tunisian intellectuals, and also Islamic feminism, have used cultural tools and values in their arguments for advancing women's status. This can be considered one of the methods of the background-vernacularist approach, which can be useful in Muslim-majority countries. In this sense, using the background-vernacularist lens as a theoretical analysis may enable us to understand what the possible strategy for complying with article 5 (a) should be and what such compliance should include.

A fifth limitation is that this thesis does not attempt to cover all of CEDAW's articles. Although there is a discussion of some articles of CEDAW that Egypt and Tunisia had made reservations to in Chapter 6, this thesis focuses on article 5(a), which will be discussed in Chapter 7. Nor does this thesis attempt to discuss the Optional Protocol to CEDAW (Op-CEDAW). Op-CEDAW was adopted by the United Nations General Assembly on 6 October 1999 and entered into force on 22 December 2000. Op-CEDAW allows for 'individual and group complaints to be made to the CEDAW Committee for investigation'.[105] Before Op-CEDAW 'there was no mechanism through which individuals could complain to the Committee about the violation of their rights under CEDAW'.[106] Monasky points out that no new rights were added by Op-CEDAW, but it added two enforcement procedures: 'the communications procedures and the inquiry procedure'.[107] The communications procedure provides individuals and groups the right to lodge complaints with the CEDAW Committee regarding violations of the provisions of CEDAW by states parties. The inquiry procedure enables the CEDAW Committee to 'conduct inquiries into serious and systematic abuses of women's rights within States Parties'.[108] Laboni Amena Hoq notes that these institutionalized procedures 'provide opportunities for women around the world to have a direct hand in the enforcement of the Convention'.[109]

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[105] Christine Chinkin, 'Feminist Interventions into International Law' (1997) 19 *Adelaide Law Review* 13, 15.
[106] Loveday Hodson, 'Women's Rights and the Periphery: CEDAW's Optional Protocol' (2014) 25(2) *European Journal of International Law* 561, 562.
[107] Monasky, above n 36 at 335.
[108] Laboni Amena Hoq, 'Women's Convention and its Optional Protocol: Empowering Women to Claim their Internationally Protected Rights' (2000) 32 *Columbia Human Rights Law Review* 677, 678.
[109] Ibid.

Although Op-CEDAW is very important for enforcing CEDAW's norms and principles, it may not be relevant to the discussion in this thesis. First, although Tunisia has ratified Op-CEDAW, Egypt has not done so. Secondly, Op-CEDAW is concerned with complaints made by individuals and groups against states parties. It is more about procedures between individuals and the CEDAW Committee, which considers the violations of CEDAW's provisions by states parties. For the purpose of this thesis, this discussion will not be included because this thesis is devoted to finding a way to promote CEDAW's norms and principles in the local discourse. It assumes that the state is part of the solution and a major player in the application of the background-vernacularist approach. It suggests that cultural change can happen by deploying a culturally-informed approach, but that it is necessary for this approach to be accompanied by the state's willingness to promote change.

V. Outline of the thesis

This thesis is devoted to developing a theoretical framework that enables us first, to understand how negative cultural norms and values that constitute the inferior status of women have been challenged in the past. Second, through the lens of the background-vernacularist approach, this thesis is also devoted to understanding how positive cultural tools and values have been and can be deployed to advance women's status and promote compliance with CEDAW. For the purpose of this, this thesis is divided into eight chapters, including this introductory chapter, and a brief conclusion.

Chapter 2 discusses the background-vernacularist approach as a theoretical construct, and provides some examples of how it may be seen to operate in practice. It first outlines feminist theorist Susan Hekman's argument about the cultural background and legal anthropologist Sally Engle Merry's discussion of the vernacularization of human rights norms in local contexts. Chapter 2 then attempts to combine these approaches together and connect them with Moroccan intellectual and theorist Muhammed Abed al-Jabri's discussion of the environmentalization of concepts. It explains how al-Jabri's discussion is relevant to the background-vernacularist approach. It also considers al-Jabri's attempt to environmentalize or vernacularize the word 'secularism' in an Arab-Islamic context. Furthermore, Chapter 2 discusses Islamic feminists and some specific transnational feminist networks concerned with

women's human rights in Muslim-majority countries. By introducing such discussion, Chapter 2 attempts to show how we can understand the work of Islamic feminism through the lens of the background-vernacularist approach.

Chapter 3 discusses the main elements of postcolonial theory. Postcolonial theory is relevant to this thesis for two reasons. The first reason is that postcolonial feminist theorists have made many arguments about women's human rights in non-Western countries. Drawing upon the terms and methods of postcolonial theory, postcolonial feminist theorists have been critical of the cultural essentialism which portrayed Third World women as victims of their culture. They attempt to produce a new and different understanding of the concept of agency and its relationship with Third World women. The second reason that postcolonial theory is presented in this thesis is to introduce two key concepts that are relevant to the background-vernacularist approach: hybridity and the subaltern. The concept of hybridity is relevant to this thesis because it describes the position of the person who is best placed to practise a background-vernacularist approach. Such a person occupies an in-between space, which allows them to be a mediator between two different cultures: human rights culture and the local culture. In addition, as will be discussed in chapter 3, it enables us to understand how the hybrid discourse can be useful for challenging any authoritative discourse. The concept of the subaltern is relevant to this thesis because it gives a better understanding of the position of disadvantaged groups of women and how they are influenced by the hegemonic discourse. However, not everything in postcolonial theory is consistent with my argument, and I also endeavour in Chapter 3 to draw out some of the points of difference.

Chapters 4 and 5 provide some illustrations of how positive cultural tools and values were deployed in the historical intellectual movements in Egypt and Tunisia. Through the lens of the background-vernacularist approach, this thesis gives a new reading of arguments that were made in Egyptian and Tunisian intellectual history about the advancement of women's status and how cultural tools and norms were used for this purpose. The background-vernacularist approach gives us concepts and idioms to understand how the cultural background of negative cultural norms and values was challenged by cultural tools and values and how new concepts were mediated in the local discourse in Egypt and Tunisia. The main purpose of these two chapters is to show that women's rights in Egypt and Tunisia were developed to some degree before

Egypt and Tunisia became signatories to CEDAW. In addition, it attempts to show that the development of women's rights in Egypt and Tunisia was based on two main factors. First, it happened because of the state's willingness to promote women's status in Egypt and Tunisia. Second, women's rights were developed because the early pro-feminist intellectuals deployed cultural methods to argue for women's rights.

Chapters 6 and 7 discuss Egypt and Tunisia in the context of CEDAW. Chapter 6 focuses on the reservations made by Egypt and Tunisia to CEDAW. Chapter 7 focuses on Egyptian and Tunisian compliance with article 5(a). There are three purposes of the discussion in these chapters. First, I attempt to determine whether Egypt or Tunisia have taken any specific measures to challenge the cultural background by deploying cultural tools and values in order to promote compliance with CEDAW. For this purpose, Chapter 6 focuses on tracing the history of constructive dialogue between the CEDAW Committee and the Egyptian and Tunisian delegations as well as the observations and concluding recommendations made by the CEDAW Committee to Egypt and Tunisia. The discussion focuses mainly on the reservations made by Egypt and Tunisia and the process by which they subsequently to withdrew from their reservations. Secondly, the purpose of the discussion in chapters 6 and 7 is to determine whether Egypt and Tunisia have developed a comprehensive strategy to challenge the cultural background that perpetuates the inferior status of women and to vernacularize women's human rights norms in the local legal and social contexts. Thirdly, the purpose of the discussion in chapters 6 and 7 is to explore the state's willingness to promote compliance with CEDAW, especially the withdrawal from reservations, and to what extent cultural tools and values have been deployed to achieve this. From the discussion in chapters 6 and 7, this thesis attempts to explore the extent to which the CEDAW Committee has mentioned anything about the deployment of cultural strategies for promoting change in its observations and concluding recommendations as appropriate measures for preparing the way for withdrawal from reservations and promoting compliance with article 5(a).

The first part of Chapter 8 discusses the relevance of the background-vernacularist approach to CEDAW, with a particular focus on articles 2 and 5. It includes further discussion of article 2 and more explanation of my understanding of the importance of

a state's willingness to promote change. The second part explains further the reasons behind using culture to promote women's human rights. This part does not deny the fact that culture is often the main source of women's oppression, and it gives examples of harmful cultural practices. However, as the second part of this chapter discusses, culture should not be seen as a single, fixed thing. It also gives a brief discussion of cultural relativism in the context of the background vernacularist approach.

VI. Conclusion

In this introductory chapter, I have discussed the research problem, which is how cultural strategies and discourse can be deployed to promote women's human rights. As I have explained, Egypt and Tunisia demonstrate potential to deploy cultural tools to improve women's status and compliance with CEDAW. I have chosen CEDAW as a key point of reference for the discussion of cultural change because women's human rights can be considered a meeting point of the political, legal, religious and socio-cultural fields. Thus, understanding how CEDAW's provisions can be placed in the local context and how they can enable cultural change by deploying cultural tools and discourse through the background-vernacularist approach may also give a better understanding of how other human rights issues can be promoted. Moreover, CEDAW obliges states parties to change their national laws, social policies, administrative law and social practices in order to achieve the equality of women.[110]

I have also briefly introduced the background-vernacularist approach, and will continue this discussion in Chapter 2. I have explained the rationale and significance of using this approach as a theoretical framework and what this approach could contribute to knowledge. One of the points that I have mentioned is that the language of the background-vernacularist approach provides a better understanding of how hybrid discourse operates. This is important because I am in a sense using Western theoretical tools to read or to understand certain interventions or arguments that have been made in Egyptian or Tunisian history to promote women's status at the legal and social levels. I have also situated this approach with the context of feminist thought, and considered how it allows us to take a hybrid position in feminist advocacy.

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[110] CEDAW art 2(f).

Chapter 2

The background-vernacularist approach

I.   Introduction

The primary argument of this thesis is that the background-vernacularist approach might provide an appropriate theoretical framework to understand how strategies focused on cultural change can be useful for promoting women's human rights. Understanding change through the lens of this approach could provide a better understanding of how compliance with CEDAW could be promoted. Hence, the argument suggests that the background-vernacularist approach can be a useful strategy for the implementation of CEDAW in Egypt and Tunisia, if the Egyptian and Tunisian governments take special and appropriate measures to promote compliance. The background-vernacularist approach might enable Egypt and Tunisia to comply effectively with article 5(a), which aims to promote cultural change and de facto compliance with CEDAW. It can be argued, as I will discuss in Chapter 7, that the background-vernacularist approach will not be fully effective without government support and also that the government cannot make change on its own. Furthermore, the state's support for women's equality may provide a symbolic reason for change. It gives women's equality 'cultural capital' in Pierre Bourdieu's sense.[1]

As I will explain later and in chapters 7 and 8, the states parties to CEDAW have an obligation to conduct human rights education to support compliance with CEDAW's provisions. The difficulty here, as I will consider later in this chapter, is not only how to educate local people about human rights norms and principles. Rather, it is how negative cultural norms and practices can be overcome and replaced by human rights norms and principles in order to create a culture of human rights that enables compliance with CEDAW.

This chapter describes the background-vernacularist approach in detail. It then considers how some works of Islamic feminism can be understood through the lens of the background-vernacularist approach. Islamic feminists have attempted to change

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[1] In chapter 4, I will explain Pierre Bourdieu's concept of field.

social meanings or at least to challenge the background of cultural concepts rooted in religious thought and practices through the deployment of religious tools – such as *ijtihad* – and through the use of general discourse.

This thesis suggests that the background-vernacularist approach prescribes cultural change and vernacularization of human rights. However, it does not prescribe a detailed blueprint for change. Cultural change needs to be promoted with multiple methodologies and does not require consistency. One has to select one's methodology for the particular situation and discourse. Different strategies are used to challenge different parts of the background. For example, when one exhausts the religious methodology that is used by Islamic feminists, it might be necessary to choose another methodology to challenge particular elements of the background. The methodologies of the background-vernacularist approach are therefore not fixed. Rather, they are flexible, as long as the chosen methodology enables the change or at least challenges the background of social meanings and as long as the concepts of the chosen methodology are understandable and will reduce resistance, when they are placed in the local discourse.

To make this brief discussion of the methodologies of the background-vernacularist approach understandable, this chapter is divided into three parts. Part II discusses the background-vernacularist approach. It is divided into two sections. The first section briefly discusses feminist theorist Susan Hekman's analysis of and reflections on background theories. The second section discusses Sally Engle Merry's vernacularist approach. Both Hekman's and Merry's approaches are highly relevant and provide brilliant contributions to the promotion of human rights and social change. The purpose of this thesis, however, is not to engage in detail with the theoretical discourse of each one of these approaches. Rather, I attempt to merge them together to show how they can be workable in Arab-Islamic societies. Of course, this approach is not restricted to Arab-Islamic societies, but can be applied in any society. But, because this thesis is about the possible application of CEDAW in Egypt and Tunisia, I focus on how this approach can be useful in such societies.

Considering Arab-Islamic countries and societies, on one hand, and the applicability of the background-vernacularist approach, on the other, leads to a discussion in Part III of this chapter of Arabic thinker Mohammed Abed al-Jabri and his ideas on how

modernity could be achieved in the Arab-Islamic world. Part III attempts to show how al-Jabri's argument is relevant to the background approach. It also shows how al-Jabri's notion of the environmentalization of concepts is similar to the concept of vernacularization of human rights norms and principles. This part also attempts to show how al-Jabri vernacularized the term 'secularism' so that it became acceptable in the Islamic-Arab sense. Part III concludes with an introduction to Islamic feminism by giving a brief discussion of the concept of *ijtihad*. Understanding the concept of *ijtihad* prepares the way to understand what Islamic feminism is about.

Part IV discusses some Islamic feminists and how they attempt to approach women's equality in Muslim-majority countries. Part IV also discusses briefly the main transnational advocacy networks that have partially adopted the background-vernacularist approach. The transnational advocacy networks considered in this chapter are Women Living Under Muslim Laws (WLUML), Sisterhood Is Global Institute (SIGI), and Musawah. The purpose of this discussion is neither to review the works of these transnational advocacy networks nor to discuss their methodologies in detail. Rather, it is to show in a brief way that those transnational advocacy networks partially rely on the background-vernacularist approach because they adopt strategies that enable them to challenge the cultural background. Their strategies are similar to the theoretical method suggested by many Islamic feminists. These networks show how theory and practice can meet, an issue which I will explain in more detail in later chapters. The main conclusion that this chapter attempts to draw is that many Islamic feminist arguments and the strategies proposed by WLUML, SIGI and Musawah are part of the methodologies that the background-vernacularist approach suggests.

II. The background-vernacularist approach

International law scholars and legal feminists need to continue to find ways to address the persistence of cultural and social norms, which are frequently cited by governments as reasons for their failure to achieve gender equality.[2] One of the obligations placed on states parties in the international human rights law system is the obligation to conduct human rights education. The Human Rights Committee in its

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[2] Yakin Erturk, 'Considering the Role of Men in Gender Agenda Setting: Conceptual Policy Issues' (2004) 78 *Feminist Review* 3, 7. Also, see the discussion of Egypt and Tunisia about their compliance with art 5(a) in Chapter 7.

general comment No 28 pointed out that public education should be included as one of the measures that states should take to achieve gender equality.[3] As I will discuss in more detail in Chapter 8, the CEDAW Committee in its general recommendation No 28 on the core obligations of states parties under article 2 of CEDAW stated that states parties should adopt measures that make sure of 'the practical realization of the elimination of discrimination against women and women's equality with men'. One of these measures is promoting 'education and support for the goals of the Conventions throughout the education system and in community'.[4]

However, it can be argued that human rights education may not be the only measure that can be used to make human rights norms and principles more understandable and acceptable for many societies. The World Plan of Action on Education for Human Rights and Democracy ('World Plan of Action') stated that 'a key challenge for the future is to enhance the universality of human rights by rooting these rights in different cultural traditions'.[5] As the World Plan of Action indicated, the main challenge is how translating human rights concepts into social norms and behaviour can be achieved. This is necessary in order to create a culture of human rights and democratic societies that enable individuals to resolve 'their disagreements with non-violent methods'.[6] The Executive Director of the United Nations Population Fund ('UNFPA') stated that

> We at UNFPA recognize the strategic priority and urgency to work through positive values that exit in all countries and in all cultures to realize further progress. We have learned through country experiences that culture matters. And, therefore, we are committed to deliberately, systematically and strategically institutionalize a culturally sensitive approach to development.[7]

The Executive Director of the UNFPA stated that in their work on culture they rely on eight principles. One of these principles is that, through a culturally sensitive

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[3] Human Rights Committee, *General Comment No 28, Article 3 (The Equality of Rights between Men and Women)* UN HRI (1834th mtg), UN Doc HRI/GEN/Rev 9/(Vol 1) (29 March 2000); Committee on Economic, Social and Cultural Rights, *General Comment No 16, The Equal Right of Men and Women to the Enjoyment of all Economic, Social and Cultural Rights (art 3 of the International Covenant on Economic, Social and Cultural Rights)* UN ESC, 34th sess., E/C.12/2005/4 (11 August 2005).
[4] Committee on the Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010) [36].
[5] UNESCO, *World Plan of Action on Education for Human Rights and Democracy, Montreal, Canada, 1993* (1993) <http://www.unesco.org/webworld/peace_library/UNESCO/HRIGHTS/342-353.HTM>.
[6] Ibid.
[7] United Nations Population Fund, *Promoting International Development Through a Cultural Lens* (21 April 2010) <http://www.unfpa.org/press/promoting-international-development-through-cultural-lens>.

approach, human rights can be internalized and recognized. This in turn gives 'social basis and support to the legal approach and that builds on positive cultural values and religious interpretations that strengthen human rights principles'.[8]

As I will discuss in more detail in Chapter 8, in 2012 the Human Rights Council Advisory Committee ('HRCAC') presented the results of its study on promoting human rights through a better understanding of traditional values.[9] The HRCAC's study argued that it is possible to encourage effective strategies to promote human rights and eliminate harmful practices by drawing on arguments that stress the positive elements of traditional values.[10] The HRCAC's study argued that, if the diplomacy of human rights is aiming to persuade people of the value of human rights, this goal could be successful if the diplomacy is based on local traditional values. As the HRAAC's study pointed out, constructing the practices of human rights based on traditional values is an effective long-term strategy.[11]

It is within this context that this thesis proposes the background-vernacularist approach to understand how the persistence of cultural and social norms can be challenged or changed. The argument of this thesis takes the form of a theoretical explanation of and for the background-vernacularist approach to promoting human rights, which is achieved by bringing together existing ideas about changing the cultural background and vernacularizing human rights norms. Where this thesis uses examples from history or from existing scholarly or activist movements, it is interpreting these interventions and arguments through the lens of changing the background and/or vernacularizing human rights norms, to show that the methods used by others can be understood and justified in terms of these ideas about achieving change.

In order to advance my argument, this part attempts to answer the question 'what is the background-vernacularist approach'? This part is divided into two sections. The first section of this part discusses Susan Hekman's arguments about the background.

[8] Ibid.

[9] Human Rights Council on Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind*, UN General Assembly, 22nd sess, Agenda Item 3 and 5, UN Doc A/HRC/22/71 (6 December 2012).

[10] Ibid [45].

[11] Ibid.

This section is devoted to showing how Hekman finds theories of the background useful to feminist arguments. Although other theorists' arguments about the background are also important, I will not discuss all the background theorists in detail because it is not necessary for my thesis. The second section in this part discusses the arguments about vernacularization of human rights norms and principles proposed by the legal anthropologist Sally Engle Merry.

A.   *The background approach*

The main purpose of Hekman's argument on feminist background theory is to reshape the feminist standpoint so that it can assist in deep cultural change.

In her feminist reflections on the background theories, Hekman advances a number of key propositions. As a preliminary point, Hekman says that 'the theorists of the background are profoundly right'. This is because the 'background' is essentially the shared foundation for knowledge, and 'human intelligibility requires common understandings'.[12] Knowledge cannot exist without shared foundations.

Hekman argues that background theories 'offer a viable epistemological alternative to two equally unacceptable positions: absolutism and nihilism'. Hekman notes that the dichotomy 'between these two positions [absolutism and nihilism] has plagued contemporary philosophical discussions and has been especially problematic in feminism'. For Hekman, theorists of the background fill the gap between nihilism and absolutism by asserting 'a non-foundational foundation'.[13] To avoid absolutism, according to Hekman, theorists of the background 'define a set of fundamental beliefs that are not absolute'. In contrast, to avoid nihilism, Hekman argues, theorists of the background identify such beliefs, which are defined as not absolute, to be useful in providing 'a secure foundation for meaning and understanding'.[14] In other words, the non-foundational foundation consists of the cultural background which is necessary for knowledge to be constructed.

Another key proposition that Hekman develops in her initial reflections on the background is that, while the background determines the possibility of intelligibility,

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[12] Susan Hekman, 'Backgrounds and Riverbeds: Feminist Reflections' (1999) 25(2) *Feminist Studies* 427, 428–9.
[13] Ibid.
[14] Ibid.

it also determines the 'possibility of changing the ground of that intelligibility'.[15] In this sense, Hekman writes, 'only by understanding the workings of the background can feminists develop strategies for changing it, that is, for constructing a social reality that breaks the bonds of masculinist domination'.[16]

Hekman's aim is to ensure that feminist discourse makes sense for people in order to change the grounded knowledge of the inferior status of women. She was, however, aware of the difficulty of this task. Hekman wondered how she could convince other feminists that her proposed analysis does explain social reality, or 'serve the goal of relieving the oppression of women'. Hekman admits that there are no 'easy answers to these questions',[17] because no analysis is available that could reveal the truth. Hekman is not trying to find the truth through her proposed analysis. However, as she points out, making arguments about truth is what is currently available to feminists. Hekman's analysis provides methods to argue for another story about the truth, but not to reveal the truth itself. I will explain this further shortly.

Hekman's proposed analysis is both an interpretive and strategic analysis. As she states, the arguments could be used to convince other feminists that her feminist concepts are useful. She reminds feminists about their shared goal, which is improving 'the material situation of women', and this should give all feminists 'some common ground'.[18]

In relation to epistemology, Hekman points out that 'feminist concepts challenge the modernist epistemology of mainstream social science. Feminist concepts reveal that all concepts are partial, political, and chosen according to the interests of the investigator.'[19] According to Hekman, feminist arguments are not acceptable to many social scientists because the modernist assumption that 'concepts correspond to social reality is still prevalent in many social sciences'.[20] Hence, as Hekman argues, making

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[15] Ibid 429.
[16] Ibid.
[17] Susan J Hekman, *The Future of Differences: Truth and Methods in Feminist Theory* (Polity Press, 1999) 52, 88.
[18] Ibid.
[19] Ibid 89.
[20] Ibid.

feminist arguments can be difficult because 'they entail a radical definition of social science'.[21]

In order to avoid the epistemological and methodological problems faced by feminists, Hekman suggests that 'feminists must construct arguments that are both convincing in the terms of the hegemonic discourse and at the same time transform that discourse'.[22] Instead of being preoccupied by revealing the truth, feminists' task is to develop 'a new methodology to accommodate differences and legitimizing [sic.] more than one path to moral truth'.[23] It is a difficult task for feminists, as Hekman admits, to displace the hegemony of the 'justice voice of Western moral theory' or 'the hegemony of the dominant tradition of Western epistemology'.[24] As Hekman argues, although feminists have attempted to 'either erase or emphasize difference', they have failed to displace 'the unitary epistemology of Western thought, but, rather, have conformed to it'.[25] To challenge the dominant Western epistemology, as Hekman suggests, feminists should pay close attention to the work of some feminist and non-feminist thinkers who have argued for 'a new conception of truth' as an alternative epistemology, an anti-foundational epistemology. Hekman argues that their discussions are crucial for the feminist project.[26]

In her focus on anti-foundational feminist and non-feminist theorists such as Ludwig Wittgenstein, Michel Foucault, Hans-Georg Gadamer, Judith Butler and Donna Haraway, to name a few, Hekman's argument is based in the following premises:

> Every society requires a ground for meaning that makes language intelligible, that this ground is ungrounded in the sense that it lacks universal validity, and that this ground provides a stable foundation for meaning that extends over time. It is my contention that these premises give rise to a set of unique problems for feminist theory. If feminists assume with the anti-foundationalists that truth statements are grounded in social meanings (or language games, or prejudices, or discourses), then their theories, unlike those of nonfeminists, must confront the inferiority of women that those social meanings dictate. The grounded ground of anti-foundational thought is synonymous with hegemonic masculinist discourse.[27]

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[21] Ibid.
[22] Ibid.
[23] Ibid 120.
[24] Ibid.
[25] Ibid.
[26] Ibid 121.
[27] Ibid.

Hekman argues that, although non-feminist anti-foundationalist epistemologists 'do not offer much guidance when it comes to how those social meanings change or might be changed', they do explain 'how change cannot occur'.[28] She explains that, according to anti-foundational epistemologists, social meanings cannot be changed by 'claiming that they are in some absolute sense "wrong" and replacing them with understandings that are "true" and "right"'.[29] If 'social meanings define what is "true," it follows that only other social meanings can define another truth that would, in turn, define another social structure'.[30]

Hekman finds that this is not particularly helpful for feminists because of its ambiguity and because the process of presenting new foundational social meanings may reinforce the inferior status of women.[31] In other words, Hekman suggests that it might not be helpful for feminist simply to critique the truth of negative social meanings, which already exist, in an attempt to replace them with other truths. This is because of the absence of 'an independent truth or reality to which' feminists can appeal. Therefore, it would seem that it leaves 'feminism in a vicious circle from which there is no escape'.[32]

Hekman attempts to elaborate her main idea by appealing to the theory of the Background, especially Wittgenstein's 'Picture Theory of Language'.[33] For Wittgenstein, propositions are pictures.[34] Pictures themselves are background facts. The task here is how can pictures be described and clarified, and ultimately altered. A certain picture prevents a specific group of people from seeing an alternative picture

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[28] Ibid.

[29] Ibid.

[30] Ibid.

[31] It could be argued that there is a parallel argument in Lama Abu-Odeh's discussion of Egyptian feminists and their efforts to reform Egyptian family law. Abu-Odeh argues that some attempts have been made to form an alliance between conservatives, including Islamic establishments and scholars on the one hand and traditionalists on the other, and liberal feminists. Abu-Odeh argues that this alliance may not favour women's human rights in the long term because family law will be fixed and will not be subject to continuous change later because liberal feminists and conservatives have agreed on specific assumptions. Abu-Odeh points out that when Egyptian liberal feminists find that there are shortcomings in their achievements, as liberal feminists in the West have found, they may not be able to extend their efforts to reform family law further. Lama Abu-Odeh, 'Egyptian Feminism: Trapped in the Identity Debate' (2004) 16(2) *Yale Journal of Law and Feminism* 145, 187.

[32] Hekman, *The Future of Differences* , above n 17 at 121.

[33] I borrowed the term 'Picture Theory of Language' from David Keyt, 'Wittgenstein's Picture Theory of Langauge' (1964) 73 (4) *The Philosophical Review* 493.

[34] David Shier, 'How Can Pictures Be Propositions?' (1997) 10 (1) *Ratio* 65, 66.

that another group of people attempts to clarify.[35] Wittgenstein stated that 'A *picture* held us captive. And we could not get outside of it, for it lay in our language and language seemed to repeat it to us inexorably.'[36] But clarification of the picture may enable a mutual understanding between two groups of people who start with a different point of view.

As Hekman explains, Wittgenstein's metaphor of the picture is one idea of the Background. Another metaphor of Wittgenstein's that Hekman used interchangeably with his metaphor of picture was that of the 'riverbed' of thoughts.[37] Wittgenstein wrote:

> It might be imagined that some propositions, of the form of empirical propositions, were hardened and functioned as channels for such empirical propositions as were not hardened but fluid; and that this relation altered with time, in that fluid propositions hardened, and hard one becomes fluid. The mythology may change back into a state of flux, the riverbed of thoughts may shift.[38]

Here, for Hekman, the picture and riverbed of thoughts refer to the background. What Hekman suggests is that feminists should make efforts to change the existing picture and replace it with another picture that related to, but is not the same as, the original picture. This also constitutes shifting the riverbed of thoughts, I will come back to this point later in this chapter.

In speaking of the background as the grounded knowledge of what is called the truth, Hekman finds Nancy Hartsock's concept of abstract masculinity useful for understanding how the background approach could work. According to Hartsock, Hekman explains, social reality was established by the ruling class, which defines 'the social world in which we all live, structuring our consciousness and our material lives'.[39] The ruling class imposes what Hartsock calls 'abstract masculinity'. As

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[35] It could be argued that there is a parallel argument between Wittgenstien's picture theory and Jean-Francois Lyotard's concept of *differend*. I will discuss Lyotard's concept of *differend* in chapter 3, when I discuss Gayatri Spivak.

[36] Quoted on Hekman, 'Backgrounds and Riverbeds' above on 12 at 434. See also, Ludwig Wittgenstein, *Philosophical Investigations* (Macmillan. 1958).

[37] Hekman writes:

Wittgenstein's uses several arresting metaphors to describe what I am calling here the Background. He refers to a "picture" that holds us captive, preventing us from seeing another picture. In his-evocation of the riverbed, the Background is the channel through which our though flows, giving it structure and making intelligible. Implicit in both metaphors is the possibility of change.'

See Hekman, 'Backgrounds and Riverbeds' above on 12 at 440.

[38] Quoted on Hekman, 'Backgrounds and Riverbeds' above on 12 at 433, see also, Ludwig Wittgenstein, *On Certainty* (Harper & Row, 1969).

[39] Ibid 436.

Hekman explains, in Hartsock's early work she attempts to locate women's experience in opposition to abstract masculinity. However, as Hekman notes, Hartsock found that women's experiences could not be reduced in a singular manner because there are multiple women's experiences.[40] For Hekman, the concept of abstract masculinity could be a central aspect of what she called the background. Hence, as Hekman points out, Hartsock found it difficult to counter 'abstract masculinity with the "truth" of the feminist standpoint'.[41] This is because there is more 'than one truth to women's experience'. Hekman further points out that another reason that could explain this difficulty is that feminist truth 'does not make sense in the discourse of abstract masculinity' because when feminists have stated their truth 'it comes out sounding like nonsense in the terms of abstract masculinity'.[42] Hekman suggests that Hartsock skipped a very important step, which is changing the criteria that determine intelligibility or 'what makes sense' before proclaiming another truth.

As I pointed out previously, Hekman suggests that feminists should make efforts to change the existing picture in order to replace it with a new picture. However, this new picture should be related to the existing picture. Drawing upon Michel Foucault's concept of 'insurrection of subjugated knowledge', Hekman points out that feminist discourse is subjugated knowledge.[43] Such discourse, which is based on the experience of women, has created a new picture. But, this new picture is 'invisible in the present picture.'[44] Hekman writes:

> The now-extensive literature on feminist epistemology elaborates the significance of this new picture of knowledge. What has not been adequately discussed in this literature, however, is how this new picture that emerges from feminist discourse relates to the Background. If the Background theorists are correct, then efforts to change the picture, to shift the riverbed of thought, must have some connection to the existing picture/riverbed. If feminist discourse is to be successful in effecting an epistemological shift, it must both make sense in the dominant discourse of the existing Background and at the same time alter that discourse. In other words, feminists must use language understandably but also subversively in order to change linguistic social practice.[45]

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[40] See Nancy C M Hartsock, 'Rethinking Modernism: Minority vs Majority Theories' (1987) 7 *Cultural Critique* 187; Nancy C M Hartsock, *Money, Sex, and Power: Toward a Feminist Historical Materialism* (Northeastern University Press, 1985).
[41] Hekman, 'Backgrounds and Riverbeds', above n 12, 437.
[42] Ibid.
[43] Michel Foucault, *Power/Knowledge* (Pantheon Books, 1980) 81.
[44] Hekman, 'Backgrounds and Riverbeds', above n 12 at 440.
[45] Ibid, 441.

Hekman argues that Donna Haraway's analysis of primatology is useful here. Hekman is interested in Haraway's argument for two reasons.[46] First, as Hekman points out, Haraway considered feminist primatology as 'a story-telling practice'.[47] For Haraway, as Hekman notes, gender, race, nation, family, nature, sexuality, and class are themes that have been 'written into the body of nature in Western science, since the eighteenth century.'[48] For Haraway, as Hekman points out, those themes should be understood as constructed categories not 'prior universal social categories'. This is because these themes are patriarchal stories. Thus, they should not be understood as *a priori* truths.

Second, understanding race and gender, for example, as patriarchal stories, means that there is possibility for telling another story, which is a feminist one. However, for Haraway, as Hekman points out, in order to tell a new feminist story, the new story should be constructed on the basis of the original story. As Hekman argues, the new story should be related to the original story, interacting with it in particular ways. At the same time, this new story should depart from the original story. When the feminist story departs from the patriarchal story, it should change its meanings.

Changing the meanings of the original story, for Hekman, can be understood through Sandra Harding's term: 'make strange what appears familiar'. Harding writes: '[T]hinking from the perspective of women's lives makes strange what had appeared familiar, which is the beginning of any scientific inquiry.'[49]

In order to fill in the gap in feminist strategies, Hekman proposes to use background theories as a guide for feminists to establish an intelligible discourse that challenges the grounded knowledge that reinforces the inferiority of women's status in the social context. This challenge enables the background, as well as its consequences, to be changed. Hekman proposes some steps to promote change in the background of grounded knowledge.

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[46] Donna Jeanne Haraway, *Primate Visions: Gender, Race, and Nature in the World of Modern Science* (Routledge, 1989).
[47] Hekman, 'Backgrounds and Riverbeds' above n 12 at 444.
[48] Ibid, 443.
[49] Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (Cornell University Press, 1991) 150; see also Teri Elliot, 'Making Strange What had Appeared Familiar' (1994) 77(4) *Monist* 424.

To change the background, according to Hekman, the first step is to bring the background itself into focus to look at its familiar concepts. These concepts should be identified and their fundamental elements should be examined. When the concepts of the background are identified and their fundamental elements are examined, their implications should be explored. Bringing the background into focus in this way allows it to be the subject of critique. The second step is to deploy Sandra Harding's concept of making 'strange what had appeared familiar'. For this argument, Donna Haraway's argument could be useful. As Hekman points out, Haraway suggests that feminists' task is not to reveal the truth or to tell a false story; the task is to tell another story and to construct an alternative story or picture. This alternative story or picture of the background does not mean that feminists are looking to reveal the truth. Rather, it enables them to argue for it.

According to Hekman this strategy involves a revision to Audre Lorde's famous dictum: 'the master's tools will never dismantle the master's house'.[50] Hekman suggests that *only* the master's tools can dismantle the master's house. As Hekman suggested, the master's tools are the discourses that establish the background. What makes them useable is that they are not 'monolithic'. Those discourses include many different resources, some of which can be 'turned into tools of resistance.'[51] In this sense, Hekman asserts, women's marginality and silence may be preserved, if the master's tools are not employed.

It should be noted here that Hekman's argument is not concerned with the application of international human rights conventions. Her argument is mainly focused on developing a feminist strategy that enables the feminist discourse to contest masculinity and women's oppression and marginality. Despite this fact, I find Hekman's argument useful in understanding article 5 (a) of CEDAW. As I indicated in Chapter 1 and I will discuss in Chapter 7 comprehensively, article 5 (a) of CEDAW urges state parties to 'modify the social patterns of conduct of men and women'. The purpose of modifying the social patterns of conduct, as article 5 (a) stipulates, is to eliminate the 'prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles

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[50] Audre Lorde, *Sister Outsider: Essays and Speeches* (Crossing Press, 1984) 112.
[51] Hekman, 'Backgrounds and Riverbeds', above n 12 at 446.

for men and women.' It could be argued here that 'the stereotyped roles for men and women' are the original picture or story, in Hekman's sense. Gender stereotyping, which I will discuss comprehensively in Chapter 7, is the picture or story that holds a certain society captive and prevents them from seeing another picture or hearing another story, which is the story about gender equality.

Hekman's argument is not therefore about human rights. In addition, although Hekman's discussion is useful, it does not provide a blueprint for how another picture or story can be constructed. Sally Engle Merry's theory of vernacularisation is useful here for explaining some of the elements of constructing another picture, as I will discuss in the following section.

B.   *Vernacularisation*

The anthropologist legal scholar Sally Engle Merry points out that, if the ideas of human rights 'are to have an impact, they need to become part of the consciousness of ordinary people around the world'.[52] This has relevance to Hekman's emphasis on background theories, which pay attention to the importance of common understandings that underpin human intelligibility. As Hekman argues, human social life would not be possible if there were not 'a core of agreed-upon assumptions about both the social and natural worlds'.[53] What Merry suggests to achieve a common understanding of the ideas of human rights is to translate them into local terms, that is, to remake these ideas of human rights in the vernacular language.

Merry points out that 'considerable research on law and everyday social life shows that law's power to shape society depends not on punishment alone but on becoming embedded in everyday social practices, shaping the rules people carry in their heads'.[54] Merry is aware of the difficulty of the task of vernacularizing human rights so that the concepts are understandable in terms of the common understandings of the local community. Merry writes:

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[52] Sally Engle Merry, *Human Rights and Gender Violence: Translating International Law Into Local Justice* (University of Chicago Press, 2006) 1, 2.
[53] Hekman, 'Backgrounds and Riverbeds', above n 12 at122.
[54] Merry, above n 52 at 2.

> [R]emaking human rights in the vernacular is difficult. Local communities often conceive of social justice in quite different terms from human rights activists. They generally lack knowledge of relevant documents and provisions of the human rights system. Global human rights reformers, on the other hand, are typically rooted in a transnational legal culture remote from myriad local social situations in which human rights are violated.[55]

Merry's argument for the vernacularization of human rights norms and principles relies on 'the role of activists who serve as intermediaries between different sets of cultural understandings of gender, violence, and justice'.[56] Merry explains:

> The global human rights system is now deeply transnational, no longer rooted exclusively in the West. It takes place in global settings with representatives from nations and NGOs around the world. Activists from many countries enthusiastically adopt this language and translate it for grassroots people. Vulnerable people take up human rights ideas in a wide variety of local contexts because they offer hope to subordinated groups.[57]

For Merry, human rights norms need to be taken from a universalist discourse to be adopted into the local language, much like a translation. However, this translation, as Merry points out, does not mean the basic meanings of human rights norms should be changed.

Merry indicates that making this translation effective requires three types of change in the ways the ideas are presented. Firstly, it requires that human rights norms should be framed in images, symbols, or religious or secular narratives that resonate with the local community.[58] Secondly, human rights should be framed for appropriate circumstances and conditions in specific places. Translation of human rights norms should take into account local economic, social and political systems. Thirdly, the targeted population should be defined.[59]

The purpose of putting human rights norms and principles into local languages and into words or pictures that ordinary people can understand is to give them the tools to change the practices that subordinate them. Thus, the point of translating treaties into local languages is to empower people to claim their rights and to put pressure on governments to create systems that are more responsive to such claims. When groups

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[55] Ibid.

[56] Ibid. Merry has watched civil society members participate at the UN and some of her views are based on those observations. The individuals she has watched are in a sense intermediaries – they understand the language of human rights and also understand their own societies.

[57] Ibid.

[58] Ibid 220.

[59] Merry writes: '[V]ictims of domestic violence in the United States are typically intimate partners, not necessarily married or heterosexual, whereas in China they are typically members of an extended household of several generations but not necessarily in intimate sexual relationships.' Ibid.

use the language of CEDAW and the Convention on the Rights of the Child to lobby for improvements to girls' education they are not vernacularizing just for the sake of vernacularizing; they are trying to educate people about their ability to make claims against their governments and are also trying to change the community's thinking about a particular issue.

Merry insists that translation does not mean transformation. Basic norms of human rights remain part of the modernist view of good and societal justice, which emphasises independence, choice, equality, secularism and integrity. Furthermore, Merry holds the state responsible for establishing these conditions so that an individual can seek their legal rights from the government.[60]

The vernacularist approach does not however suggest that we need to challenge the background of social meanings. It attempts to achieve social change by suggesting that human rights norms and principles should be translated into the local discourse whether this is religious, traditional or secular. It suggests, rightly, that the translators of human rights should pay close attention to the appropriate circumstances of the places and the targeted population. My purpose here is not to criticize the vernacularist approach because I find it useful, as do many other scholars and human rights advocates. However, I believe it can be made more effective in promoting human rights principles and norms, by supplementing it with an approach which also pays attention to changing the cultural background.

Although vernacularization is important because it seeks to make human rights norms intelligible to human beings in the local context, it does not suggest challenging the social meanings that reinforce social injustice and inequality in the society. When, for example, a customary law or religious law in a certain society supports social injustice and inequality by suggesting that there are inferior groups and superior groups in society, it might be difficult to rely only on vernacularizing equality norms and principles.[61] This is because such inequality has its background in religion, customs, history and literature. It is rooted in the background of the social construction. The basis of the vernacularization approach is that the unfamiliar

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[60] Ibid 221.

[61] It is beyond the scope of my thesis to do extensive research on what is happening in the field. This means that I am aware of the fact that my practical knowledge about the vernacularization of human rights is limited.

concepts of human rights should be transformed into the local discourse to be familiar and intelligible. It is about making strange concepts appear familiar in the local context. Clearly, however, vernacularizers may meet with resistance from traditional or religious groups who believe in the inequality of certain groups in society and who perceive that they have legitimate arguments that derive from their religion, custom, history and literature. The background approach proposed by Hekman becomes especially applicable in such a situation. In this sense, it might be appropriate in many instances to combine the background and vernacularist approaches to complement each other in order to improve the potential for compliance with human rights norms and principles.

III.   Making sense of the background-vernacularist approach

As Hekman argues, the background approach suggests that in order to present a different truth, it is crucial to create the criteria of that truth in the first place so that it will be intelligible. In the vernacularist approach, the new truth that human rights advocates and vernacularizers attempt to present is the transformed and translated concepts of human rights norms and principles. The question here is: Does vernacularization of human rights in specific contexts also rely on changing the cultural background so that the human rights discourse can be accepted?

This part attempts to give two examples in order to make sense of why I have combined two approaches together to become the background-vernacularist approach. The first example is the environmentalization of concepts. The steps of the environmentalization of concepts suggested by Mohammed Abed al-Jabri are similar to what I have described as the background-vernacularist approach. This will be discussed shortly. The second example is the concept of *ijtihad*, which is one of the main religious tools that is used to re-interpret religious texts in order to revise or produce religious rules. *Ijtihad* is discussed in this chapter for two reasons. First, *ijtihad* can be a useful tool for demanding women's human rights in Muslim-majority countries. It allows a challenge to the background of cultural norms and social meanings that constitute the inferior status of women, especially in family law. Second, *ijtihad* is discussed in this part as an introduction to the following part of this chapter, which will discuss the role of Islamic feminism; and it is to understand how

Islamic feminism operates to challenge the cultural background of religious norms and principles.

A. *Environmentalization of concepts: an example of environmentalizing secularism*

For a better understanding of how the vernacularization of concepts could take place in the Islamic-Arab world, it is useful to look at the Arabic thinker Mohammed Abed al-Jabri's argument about *Tabiyat almafaheem* (literally environmentalization of concepts).

Al-Jabri's work can help us to understand how the background approach and vernacularist approach could work together. In particular, his argument regarding the environmentalization of concepts can be understood as an approach that is similar to Merry's vernacularisation theory. In addition, the strategy to environmentalize concepts can be seen as a strategy that builds on a basis of changing the cultural background. Having said this, it is difficult to find exactly parallel arguments between al-Jabri's approach and Hekman's approach. To clarify our understanding of how al-Jabri's argument is relevant to the background-vernacularist approach, we need to consider al-Jabri's argument about how modernity can be achieved in the Arab world.

First, al-Jabri believes in the gradual historical development of modernity. [62] He argues that Arabic modernity did not pass through all the stages that Western modernity progressed through. Western modernity, al-Jabri argues, is a consequence of the historical development of European thought. [63] European thought passed through two phases: the Renaissance in the sixteenth century, followed by the Enlightenment phase that occurred in the eighteenth century. As a result, modernity emerged in the nineteenth century. On this basis, al-Jabri points out that, while Arabic intellectuals are discussing modernism in the twentieth century, Western intellectuals are discussing postmodernism because they consider modernism to be a phenomenon

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[62] Mohammed al-Jabri, *Arab-Islamic Philosophy: A Contemporary Critique* (Aziz Abbassi trans, University of Texas Centre for Middle Eastern Studies, 1999) [trans of: *Nahnuwa'l-Turath: al-Khitab al-'Arabi al-Mu'asir: DirasahTahiliyyahNaqdiyyah* (1982)]. Al-Jabri's arguments about modernity first appeared in the introduction of his article 'Nahnuwal-Turath' (The Heritage and Us) which was published separately in 1980 and later included in this collection of his works.
[63] Ibid 1–2.

that reached its peak in the nineteenth century. They consider modernism a result of the historical development of their thought.

Second, al-Jabri believes in the significant role of the claim of authenticity of modernism in Arab world. Al-Jabri argues that modernism in the Arab world is different from Western modernism because it is not derived from the historical development of Arabic thought. Arabic modernism, according to al-Jabri, emerged one hundred years ago.[64] Its stages came together within a fast time frame. The stages of Arabic modernism were interweaved and emerged rapidly without developing the principles of each stage. As al-Jabri argues, while European modernism means the revival of the Western epistemological heritage in order to discuss rationality and democracy as well as human rights, Arabic modernism bypassed the Renaissance and Enlightenment stages altogether and jumped immediately to rationality, democracy and human rights. This happened, al-Jabri argues, without investigating the roots of rationality in the Arab-Islamic epistemological heritage.

Third, al-Jabri asserts the importance of changing the background of the Arab-Islamic epistemological heritage so that modernist principles such as human rights, democracy and rationality can be adopted.[65] As al-Jabri argues, many Arab intellectuals attempt to discuss rationality and democracy without investigating their roots in Arab-Islamic epistemology. This means, as al-Jabri argues, that those intellectuals have failed to deconstruct the dominant principles that determine the truth in Arab-Islamic epistemology in order to construct new principles. Here, as in Hekman's background approach, al-Jabri suggests that the elements that established the background of the truth in Arab-Islamic epistemology should be deconstructed before Arab intellectuals claim new truth which supports rationality and democracy.

Fourth, al-Jabri asserts the importance of a shared common intelligibility. He argues that the project of modernity in the Arab world has been ineffective because it has been perceived as imported from outside.[66] It created a negative reaction in Arab societies. Arab conservatives resisted modernity, portraying it as an alien invader that comes to destroy Arab-Islamic identity, values and principles. In order to avoid this,

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[64] Ibid.
[65] Ibid 3–4.
[66] Ibid 5.

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al-Jabri suggests that Arab intellectuals should practice rationality in their investigation of Arab-Islamic traditional epistemology and the prevailing roots of dictatorship and its manifestations. In doing so, Arab intellectuals will be able to establish their own modernity, enabling it to join the universal modernity. This argument is broadly similar to Hekman's ideas about promoting change in the epistemological background. Modernity for al-Jabri is about modernizing rationality and beliefs. For al-Jabri, if the predominant culture supports tradition, such as religious discourse, then the discourse of modernity should be based on investigating that tradition. There is therefore a parallel argument between al-Jabri's argument and the background approach. As I discussed previously in this chapter, Hekman suggested that in order to replace the original story with a new story, the latter should be related to the original one. Similarly, al-Jabri suggests that Arab intellectuals – in their argument for rationality and democracy – should make their argument relevant to the discourse that the local culture supports. So, if the local culture supports the tradition, Arab intellectual should focus on the tradition. Hence, tradition should be investigated, al-Jabri argues, in order to re-interpret the principles and values of the tradition, and to present modern points of view, which is the new story or picture in Hekman's sense. In doing so, al-Jabri argues, modernity will be acceptable in the hearts and minds of all people in Arab-Islamic society. Then it will achieve its goals with less resistance than previously.[67]

Another relevant argument to the background-vernacularist approach made by al-Jabri was what he called the environmentalization of concepts of modernity. This argument can be compared to the vernacularisation theory of Merry.

The environmentalization of concepts, for al-Jabri, has two steps. The first step is to bring the targeted concept into focus and explore its history and origin. The second step is to think of how the concept could be implanted in the background of the

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[67] Al-Jabri wrote:
> This is the conception of modernity that we ought to define in light of our present. Modernity is above all rationality and democracy. A rational and critical approach to all aspects of our existence – of which tradition emerges as one of the aspects that is most present and most rooted in us – is the only true modernist option. Our concern with tradition is therefore dictated by the necessity to elevate our approach to tradition to the level of modernity, in order to serve modernity and to give it a foundation within our 'authenticity'. Ibid 7.

targeted epistemological environment. [68] For instance, in his attempt to environmentalize the concept of secularism in Arab thought, al-Jabri argues that the Western concept of secularism has no background in the Islamic world. Therefore, it could not be located easily.[69] However, al-Jabri suggests that Arab intellectuals could use the concepts of democracy and rationality to replace the idea of secularism.[70] They will be more intelligible and acceptable in the Islamic-Arab world and will face less resistance.

This section can be concluded as follows. There are parallels between the arguments of Hekman, Merry and al-Jabri. When Hekman suggests that human intelligibility requires common shared assumptions, and that these must be changed to enable social change and the empowerment of women, she speaks of changing the background. The background that was constituted by abstract masculinity to enforce the inferior status of women cannot be changed, unless feminists change its elements. Although background theory appears conservative because it emphasises stable cultural values, it is not necessarily, because there is no fixed foundation of foundational epistemology. Similarly, Merry suggests that human rights norms and principles will not be effective unless they are translated into the vernacular language. Merry is suggesting using the common understandings of local people to make human rights principles familiar. Al-Jabri's discussion of modernity in the Arab world supports these same arguments. I have used Hekman and Merry's arguments instead of al-Jabri's argument to frame my argument in this thesis because they help us to see the concepts within the context of Western theory and its efforts both to change itself and to promote human rights across the world.

B.   *The concept of ijtihad*

Such an account of deploying the background-vernacularist approach, as a proposed combined strategy for the application of CEDAW, can also be explained by analogy to some works of Islamic feminists who deploy religious methodologies and discourse to advocate for women's rights and social justice in Islamic countries and societies.

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[68] Mohammed Abed al-Jabri, 'Islah Tabiyat almafaheem: al-Ilmaniah Inmothajan' [The Reform: Environmentalization of Concepts: Secularism as a Case Study] <http://hem.bredband.net/b155908/m382.htm>.
[69] Saed Shabar, 'Al-Ilmaniah al-Arabiah: Khitab da' im al-iltbas' [Arabic Secularism: A Lasting Confusing Discourse] <http://www.aljabriabed.net/n44_03chbbar.htm#_ednref7>.
[70] Ibid.

The background-vernacularist approach stresses the importance of deploying cultural tools.[71] As I mentioned in the introduction, the background-vernacularist approach is not restricted to one methodology; it is not prescriptive and it does not require consistency. The background-vernacularist approach can adopt multiple methodologies to challenge the concepts of the background that establish social injustice and inequality. It also aims to replace them with principles and norms that support equality and social justice for both women and men. It emphasises both theory and practice to give a broad understanding of how international human rights norms and principles could be applied. The background-vernacularist approach is about promoting changes to the cultural background as well as vernacularizing women's human rights norms and principles. The two strategies complement each other. This approach requires consideration of religious concepts as part of the cultural context of a society.

Islamic jurisprudence is arguably one appropriate starting point for deploying the background-vernacularist methodology to improve women's human rights in Muslim countries. It might be used to investigate women's status in Islamic teachings in order to bring its elements into focus and examine its implications and then shift them in the direction of equality and women's human rights principles. The main aspect of Islamic jurisprudence that enables this methodology to work is the notion of *ijtihad*. In Islamic jurisprudence *ijtihad* refers to 'personal effort undertaken by the jurist in order to understand the source and deduce the rules or in the absence of a clear textual guidance, formulate independent judgments'.[72] Nadirsyah Hosen writes:

> *Ijtihad* in Islamic law can be defined simply as 'interpretation.' It is the most important source of Islamic law next to the *Qur'an* and the *Sunnah*. The main difference between *ijtihad* and both the *Qur'an* and the *Sunnah* (the traditions of the Prophet) is that *ijtihad* is a continuous process of development whereas the *Qur'an* and the *Sunnah* are fixed sources of authority and were not altered or added to after the death of the Prophet.[73]

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[71] Cultural tools here refers to the tools that constructed the culture such as the religion, history, customary law, literature (novels and poetry), the law and court cases.

[72] Tariq Ramadan, 'Ijtihad and Maslaha: The Foundation of Governance' in M A Muqatedar Khan (ed), *Islamic Democratic Discourse: Theory, Debates and Philosophical Perspectives* (Lexington Books, 2006) 3, 9–10. See also Adham A Hashish, '*Ijtihad* Institutions: The Key to Islamic Democracy Bridging and Balancing Political and Intellectual Islam' (2010) 9(1) *Richmond Journal of Global Law & Business* 60, 67; Amna Arshad, 'Ijtihad as a Tool for Islamic Legal Reform: Advancing Women's Rights in Morocco' (2006) 16 *Kansas Journal of Law and Public Policy* 129.

[73] Nadirsyah Hosen, 'Nahdlatul Ulama and Collective *Ijtihad*' (2004) 6 *New Zealand Journal of Asian Studies* 5, 5.

Discussing the definition of *ijtihad*, Wael Hallaq writes:

> As conceived by classical Muslim jurists, *ijtihad* is the exertion of mental energy in the search for a legal opinion to the extent that the faculties of the jurist become incapable of further effort. In other words, *ijtihad* is the maximum effort expended by the jurist to master and apply the principles and rules of *usul al-fiqh* (legal theory) for the purpose of discovering God's law. The activity of *ijtihad* is assumed by many a modern [sic] scholar to have ceased about the end of the third/ninth century, with the consent of the Muslim jurists themselves. This process [is] known as 'closing the gate of *ijtihad*' (in Arabic: '*insidad bab al-ijtihad*').[74]

The practice of *ijtihad* is often viewed as being solely the work of jurists and religious scholars. This is due to two points. Firstly, it is due to the complicated process and requirements of the interpretation of theological texts in Islamic jurisprudence. Secondly, the results of *ijtihad* could lead to a legal decision or at least to jurisprudential opinion, which in turn may pose a challenge to the prevailing jurisprudential views.

Examining women's status by *ijtihad* from Islamic jurisprudence and the history of Islamic religious literature is the main work of Islamic feminism. This is because many Islamic feminists are mainly focused on the reform of Islamic family law, as I will discuss later. The difficulty with Islamic feminists practising *ijtihad* is that their conclusions may not be accepted or taken seriously. Therefore, the results of their *ijtihad* may not lead to a legal decision or a respected religious opinion such as a *fatwa*. As mentioned, *ijtihad* is supposed to be practised by a recognized religious scholar, who is usually male.[75] A recognized religious scholar in this context is normally a graduate of a prestigious Islamic university such as Al-Azhar University in Egypt or Al Zaytona University in Tunisia and other religious Universities. Alternatively, the scholar should have been recommended by other recognized religious scholars. This requires a proper training in *ijtihad*. Asifa Quraishi-Landes notes that, 'without proper training in *ijtihad*, a scholar's *fiqh* [Islamic jurisprudence] conclusion will not garner the status of probability that gives it validity, and *ijtihad*

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[74] Wael B Hallaq, 'Was the Gate of Ijtihad Closed' (1984) 16 *International Journal of Middle East Studies* 3, 3.

[75] For example Himat Hafez Barrazangi points out that one of barriers that Muslim feminists face in the United States of America is that male religious scholars are still the main identified religious group who practise *ijtihad* or the interpretation of Quranic texts. In other words, male religious scholars in the United States monopolize the Islamic religious field. Himat Hafez Barrazangi, 'Why Muslim Women are Re-interpreting the Qur'an and Hadith: A Transformative Scholarship-Activism' in Marie A Failinger, Elizabeth R Schiltz and Susan J Stabile (eds), *Feminism, Law, and Religion* (Ashgate, 2013) 257, 271–3.

expertise is no small accomplishment'.[76] A second reason for the non-recognition of feminist practitioners of *ijtihad* is that many religious scholars have agreed that the door was closed on practising *ijtihad* a long time ago.[77] The main idea behind closing the door on *ijtihad* is the belief that scholars prior to the third/ninth century resolved all the issues of Islamic practices. The main basis for this belief is what is called *ijma al Ulama* (the past consensus of religious scholars or jurists). Quraishi-Landes considers that the idea of past consensus is one of the main obstacles facing the reform of Islamic family law, for example marriage law. Quraishi-Landes writes:

> The impact of past consensus – is a bit more complicated and potentially more of an obstacle. Consensus, a core idea in established Islamic legal theory, can have a drastic impact upon the staying power of individual *fiqh* rules. To put it briefly, Islamic jurisprudence is built upon the multiplicity of many different schools of *fiqh* doctrine, but if there is unanimous agreement of all qualified jurists of a given age, that agreement has a higher status than an average *fiqh* rule. According to Islamic legal theory, consensus transforms a *fiqh* rule from mere probability to certainty – the same epistemological status as the Quranic text.[78]

Following this logic, Islamic feminist methods can be considered among the methods that the background-vernacularist approach suggests could be deployed in Muslim-majority countries. Suggesting that Islamic feminist methods could be considered as methods of the background-vernacularist approach to advocate for women's human rights does not mean that the background-vernacularist approach is restricted to Islamic feminism or that Islamic feminists are aware of such an approach. Rather, my point is that certain Islamic feminist arguments can be interpreted through the lens of the approach that I develop in this thesis. The background-vernacularist standpoint suggests that any method that enables changing the cultural background and vernacularizing women's human rights norms and principles in the local context is a relevant and applicable method. In this sense, the background-vernacularist approach suggests that Islamic feminist methods are a useful tool in Muslim societies for promoting cultural change. This is because, as I will discuss later, Islamic feminism

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[76] Asifa Quraishi-Landes, 'A Meditation on *Mahr*, Modernity, and Muslim Marriage Contract Law' in Marie et al (eds), *Feminism, Law, and Religion* (2013) 173, 185.

[77] For an interesting historical investigation and explanation of how *ijtihad* was closed, see Robert R Reilly, *The Closing of the Muslim Mind: How Intellectual Suicide Created the Modern Islamist Crisis* (ISI Books, 2011).

[78] Quraishi-Landes, above n 76 at 186.

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considers a 'non-foundational foundation' for the inferior status of women in Islam.[79] Islamic feminism differentiates between the spirit of Islam, which I will describe in Chapter 5 in my discussion of Tunisian feminist intellectual al-Tahir al-Haddad, and Islam as a jurisprudence system, which I will discuss in the following part.

For Islamic feminism, Islam as a system of belief does not discriminate between male and female. It treats them equally as worshipers of God. However, Islam as a jurisprudence or what could be called Islamic law is patriarchal. It is patriarchal and discriminates against women because, as many Islamic feminists argue, Islamic law was based on the patriarchal interpretation of religious texts because the majority of Islamic scholars who participated in the development of Islamic jurisprudence were male. As I will explain later, this differentiation between the spirit of Islam, which refers to justice, equality, compassion and freedom, and Islam as jurisprudence still faces resistance from many religious scholars. Through the lens of the background-vernacularist approach, we can understand that Islamic feminism has deployed religious discourse to challenge and deconstruct another religious discourse. In addition, it made strange what had appeared familiar because it differentiates between Islam as a system of belief and Islam as a jurisprudence system. This will be explained in the following part.

The following part briefly discusses Islamic feminism. Then, I would like to give an example of some transnational networks that have deployed similar methods as those used by Islamic feminism in the advocacy of women's human rights in Muslim-majority countries.

IV. Re-interpreting Islamic feminism through the lens of the background-vernacularist approach

In a very broad sense, scholars describe Islamic feminism as centred on the effort to promote women's rights in a way which remains consistent with core Islamic values. For instance, Wendy Isaacs-Martin points out that 'Islamic feminisms offer an interpretation of human rights within the contexts of western philosophy and Islamic

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[79] Shahrazad Mojab points out that 'Islamic feminists … demand equality in law much in the same way that' liberal feminists advocated formal equality. Shahrazad Mojab, 'Theorizing the Politics of "Islamic Feminism"' (2001) 69 *Feminist Review* 124, 138.

society in accordance with Qur'anic interpretations'.[80] In a similar vein, Raja Rhouni describes the Islamic feminist position as a position that might be 'either from a position of faith' or from a strategic position that seeks to contextualize what have been considered 'Islamic gender norms'.[81] It suggests the historical 'contingency and cultural constructedness of these norms'.[82] This strategic position, for Rhouni, 'should not always be distrusted as denoting an opportunistic, hypocritical, attitude that participates in the instrumentalization of religion'.[83] Rather, it is a position that refuses to remain in 'the elitist ivory tower of "enlightened secularist intellectuals"'.[84]

Rebecca Barlow and Shahram Akbarzadeh argue that advocacy for women's human rights in Muslim societies, which is the main target of Islamic feminism, does not necessarily reject Islam. Rather, it seeks the re-investigation of the historical texts of Islam in order to differentiate between God's 'ordinances and the transcendental spiritual message of Islam'.[85] Similarly, Riham Bahi describes the work of Islamic feminists as scholarship that articulates 'a gender-sensitive discourse within an Islamic framework or paradigm'.[86] It uses '*ijtihad* (independent investigation of the religious sources) and *tafsir* (interpretation of the Qur'an) as their basic methodology in order to establish a new gender-sensitive hermeneutics'.[87]

However, as Bahi argues, some secular feminists have criticized the Islamic feminist methodology of re-reading religious texts in a 'liberatory mode'.[88] According to Bahi, secular feminists dismiss the alternative reading of religious texts, which could be liberatory. Bahi agrees with Jasmine Zine that some secular feminists 'fall into the same trap as fundamentalists who derive only static and literal meanings from the Qur'an'.[89] Ziba Mir-Hosseini points out that 'all these opponents of the feminist project in Islam share one thing – an essentialist and non-historical understanding of

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[80] Wendy Isaacs-Martin, 'Muslim Women and Human Rights: Does Political Transformation Equal Social Transformation?' (2013) 40(1) *Politikon* 113, 117.

[81] Raja Rhouni, *Secular and Islamic Feminist Critiques in the Work of Fatima Mernissi* (Brill, 2010) 23.

[82] Ibid.

[83] Ibid.

[84] Ibid.

[85] Rebecca Barlow and Shahram Akbarzadeh, 'Women's Rights in the Muslim World: Reform or Reconstruction?' (2006) 27(8) *Third World Quarterly* 1481.

[86] Riham Bahi, 'Islamic and Secular Feminisms: Two Discourses Mobilized for Gender Justice' (2011) 3(2) *Contemporary Readings in Law and Social Justice* 138, 146.

[87] Ibid.

[88] Ibid 147.

[89] Ibid.

Islam and Islamic law'.[90] Mir-Hosseini differentiates between Sharia as what Muslims believe is 'the totality of God's will as revealed to the prophet Muhamed' and the science of jurisprudence, which is called *fiqh* (literally 'understanding'). The Islamic science of jurisprudence, *fiqh*, 'is the process of human endeavor to discern and extract legal rules from the sacred sources of Islam' such as the Quran and the Sunna (reported sayings and deeds of Prophet Muhammed).[91]

Ignorance of this difference between Islam as a religion of belief and Islamic law as a system of jurisprudence has created misunderstanding about what Islamic feminist work is about. Mir-Hosseini is aware that 'religious faith and organised religion are linked, but they are not same thing, as is implied by conflating them in the label "Islamic" or "religious"'. As Mir-Hosseini points out, *fiqh* 'is often mistakenly equated with Sharia'.[92] Therefore, the texts of *fiqh*, 'which are patriarchal in both spirit and form, are frequently invoked as God's law, as a means to silence and frustrate Muslim's search for legal justice and equality'.[93] On the basis of this, Mir-Hosseini's mission as an Islamic feminist is 'to challenge the patriarchal interpretations of the Sharia at the level of *fiqh*, which is nothing more than the human understanding of the divine will'.[94] This lasting confusion between Sharia and *fiqh* put religious and traditional fundamentalists and secular fundamentalists in the same position. As Mir-Hosseini explains, while Muslim traditionalists and fundamentalists confuse the two concepts as 'a means of silencing other internal voices and [to] abuse the authority of the text for authoritarian purposes', secular fundamentalists do the same. Secular fundamentalists deploy the concepts of enlightenment and science as 'a means of showing the misogyny of Islam'. However, as Mir-Hosseini argues, secular fundamentalists ignore 'the contexts in which the texts were produced, as well as the existence of alternative texts'.[95]

It can be argued that the methodology of Islamic feminism is like a legal jurisprudential methodology that seeks the reform of Islamic family law through deploying the same legal methods that Islamic fundamentalists used to produce a

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[90] Ziba Mir-Hosseini, 'Muslim Women's Quest for Equality: Between Islamic Law and Feminism' (2006) 32(4) *Critical Inquiry* 629, 641.
[91] Ibid 632.
[92] Ibid.
[93] Ibid 633.
[94] Ibid.
[95] Ibid 641.

patriarchal Islamic law that discriminates against women and reinforces their inferior status in societies. Margot Badran points out that, while secular feminism in the Arab world enabled women to participate in public life through breaking down the dichotomy between the private and public sphere, Islamic feminism is more appropriate for reforming Islamic family law.[96]

As I have indicated earlier in this chapter, the purpose of the background-vernacularist approach, however, is more than merely the reform of Islamic family law; it attempts to achieve broad cultural change, which allows the norms and principles of equality and social justice, which are stipulated in international human rights conventions, to be placed in the domestic context. It is neither religious nor secular. It can be considered as a hybrid approach that allows the people who practice it to occupy in-between spaces that allow them to be mediators between different cultures; this notion of hybridity will be discussed in more detail in Chapter 3. This is because the background-vernacularist approach is interested in any discourse or methodology that advocates equality and social change for all human beings regardless of their gender, origin or religion.

The background-vernacularist approach promotes changing the background concepts behind social injustice and inequality by deploying the same methodology and discourse that constructs these concepts. It suggests that each methodology taken for this purpose should be exhausted. When one finds that the concepts of the background that established social injustice and inequality cannot be challenged by the first methodology deployed, one should move to another methodology that enables the background to be challenged. Islamic feminism can be considered a possible focal point for the background-vernacularist approach because in its advocacy of the promotion of women's human rights in Muslim-majority countries it reinterprets religious discourse to challenge anti-feminist or anti-human rights discourse. As I discussed earlier, one of the steps that enables the background of social meanings or their riverbed of thought to be changed is making sense of the discourse. Making sense of the discourse requires that the discourse should not be unreasonable to the dominant discourse or to ordinary people. What many Islamic feminists are doing is

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[96] Margot Badran, 'From Islamic Feminism to a Muslim Holistic Feminism' (2011) 42(1) *IDS Bulletin* 78, 80–2.

deploying religious discourse that supports women's human rights, to deconstruct another religious discourse that constitutes the inferior status of women in Islamic discourse. Moreover, Islamic feminism is relevant to the background-vernacularist approach's methods because it attempts to make strange what had appeared familiar. This can be seen in its attempts to distinguish between the spirit of Islam and Islamic law. Instead of conflating the two, Islamic feminism separates them. This gives Islamic feminists more space to criticize the inferior status of women in Islamic jurisprudence, while they can avoid criticizing Islam *per se*. In this sense, criticizing Islamic jurisprudence, which many Islamic feminists consider male-made and patriarchal, is not criticizing Islam as a religion or a system of belief.

In order to understand this better, the following section discusses some transnational networks that adopt the methodology of Islamic feminism to advocate the promotion of women's human rights in Muslim-majority countries. My discussion of transnational advocacy networks in this chapter is limited to Women Living Under Muslim Laws (WLUML), Sisterhood Is Global Institute (SIGI), and Musawah. The purpose of this discussion is neither to review the works of these transnational advocacy networks nor to discuss their methodologies in detail. Rather, it is to show in a brief way how we can interpret the activities of those transnational advocacy networks through the lens of the background-vernacularist approach. This is because they have adopted strategies that enable them to challenge the cultural background. Their strategies are similar to the theoretical method suggested by many Islamic feminists. These networks show how the theory and practice can meet, as I will explain later in this chapter.

A. Transnational networks

Margaret Keck and Kathryn Sikkink define transnational advocacy networks as networks that include 'relevant actors working internationally on an issue, who are bound together by shared values, a common discourse, and dense exchanges of information and services'.[97] For Keck and Sikkink, transnational advocacy networks aim to 'change the behavior of states and of international organizations'.[98] At the same time, they frame issues 'to make them comprehensible to target audiences, to

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[97] Margaret E Keck and Kathryn Sikkink, *Activists Beyond Borders*: *Advocacy Networks in International Politics* (Cornell University Press, 1998) 2.
[98] Ibid.

attract attention and encourage action, and to "fit" with favorable institutional venues'.[99] The actors in transnational advocacy networks 'bring new ideas, norms, and discourses into policy debates, and serve as sources of information and testimony'.[100] Networks are 'communicative structures' and, in order to 'influence discourse, procedures, and policy, activists may engage and become part of larger policy communities that group actors working on an issue from a variety of institutional and value perspectives'.[101]

Drawing upon this brief definition of transnational advocacy networks, Valerie Sperling, Myra Ferree and Barbara Risman point out that transnational advocacy networks 'typically identify themselves with social movements, such as environmentalism or feminism'.[102] They do this as 'a means of naming the values, discourses, and objectives that bind them together'.[103] For Sperling, Ferree and Risman, transnational advocacy networks should not themselves be considered as social movements. This is because social movements involve 'mass mobilization, contentious and confrontational tactics, and efforts to carry politics out of conventional venues into the streets'.[104] Unlike social movements, transnational advocacy networks 'mobilize smaller numbers of individual activists who use more specialized resources of expertise and access to elites'. These networks provide 'new information to political leaders and reframe issues for elites in an attempt to gain the support of powerful institutions for their ideas'.[105] This is 'rather than relying on demonstrations of mass public support and overt confrontations with authorities'.[106] However, the main shared principle between transitional advocacy networks and social movements is the achievement of social change.

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[99] Ibid 3.
[100] Ibid.
[101] Ibid.
[102] Valerie Sperling, Myra Marx Ferree and Barbara Risman, 'Constructing Global Feminism: Transnational Advocacy Networks and Russian Women's Activism' (2001) 26(4) *Signs: Journal of Women in Culture and Society* 1155, 1156.
[103] Ibid.
[104] Ibid 1157.
[105] Ibid; also see Keck and Sikkink, above n 97 at 30.
[106] Ibid.

Claudia Derichs points out that the description of transnational advocacy networks 'matches with transnational Islamic women's networks'.[107] Transnational Islamic women's networks are similar to other women's transnational advocacy networks because they are 'organized around principles of challenging gender hierarchy and improving the conditions of women's lives'.[108]

B. The practical project of Islamic feminism

Two of the main transnational feminist networks during the heyday of second wave feminism in the early 1980s, which were established by secular feminists, were Women Living Under Muslim Laws (WLUML) and Sisterhood Is Global Institute (SIGI).[109]

1. WLUML and its approach to women's religious identity

WLUML emerged in 1984 as a response to the rise of fundamentalism in Algeria. Madhavi Sunder points out that the main strategic work of WLUML 'offered an important retort to fundamentalists who depicted women's rights as "Western" and un-Islamic'.[110] WLUML's approach does not only confront 'fundamentalist understandings of religion, but formal legal understandings, as well'. As Sunder points out, WLUML found that the religious identity imposed on women can be considered as the main challenge to women's rights because laws in Muslim societies 'are characterized as Islamic, divinely ordained' and cannot be challenged.[111] In this sense, 'religious laws are deemed fixed and immutable'. On the basis of this 'women and men are made to believe that the fundamentalist view is the only way imaginable for a woman unless she abandons her religion'.[112] So, as WLUML notes, this religious identity, which was imposed on women, affects women even in secular states. WLUML dealt with this issue by avoiding advocating women's equality on the basis of 'purely secular strategies'.[113] Its approach 'entails both critiquing the fundamentalist claims about women's religious identity and empowering women to

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[107] Claudia Derichs, 'Transnational Women's Movements and Networking: The Case of Musawah for Equality in the Family' (2010) 14(3) *Gender, Technology and Development* 405, 409.
[108] Sperling, Ferree and Risman, above n 102 at1157.
[109] Margot Badran, 'Re/placing Islamic Feminism', *SciencesPo* <http://www.sciencespo.fr/ceri/sites/sciencespo.fr.ceri/files/ci_feminism_iran_mb.pdf.>.
[110] Madhavi Sunder, 'Piercing the Veil' (2003) 112 *Yale Law Journal* 1399, 1434.
[111] Ibid 1436.
[112] Ibid.
[113] Ibid.

reshape religious identity in more egalitarian terms'. WLUML recognized that many women will resist rights 'if they are only possible outside the context of religious and cultural community. Thus, it pursues strategies that would reconcile religion and rights, making it possible for women to have both.'[114]

On the basis of this approach, WLUML spent ten years from 1991 to 2001 compiling 'a compendium of family laws (including Muslim, secular and customary laws) in Muslim majority countries'.[115] It is entitled *Knowing Our Rights: Women, Family, Laws and Customs in the Muslim World*. WLUML argued that 'Islamic laws have been based on disparate interpretations of Islamic jurisprudence and/or resulted from external influence'.[116] 'The clear implication and the message of WLUML's effort is that there is no consensus with regards to the particular form these laws should take, that they are man-made, not divine, are therefore subject to change.'[117]

2.   SIGI's model of human rights education

The Sisterhood Is Global Institute (SIGI) was initially established by American feminist Robin Morgan and in the early 1990s Mahnaz Afkhami and Haleh Vaziri assumed leadership. SIGI launched a pioneering program to produce a human rights manual containing Quranic verses and Hadith supporting the idea of women's rights. By couching their manual in religious terms, they aimed to make it more appealing and comprehensible to ordinary Muslims. It was first introduced in English in 1996 and subsequently appeared in numerous languages spoken in Muslim societies around the world. *Claiming Our Rights: A Manual for Women's Human Rights Education in Muslim Societies* has had a significant impact on the ground, enabling women to see themselves as human beings with equal rights in the context of Islam.

The purpose of *Claiming Our Rights: A Manual for Women's Human Rights Education in Muslim Societies* is to provide a model of human rights education in order to 'facilitate transmission of the universal human rights concepts inscribed in the major international documents to grassroots populations in Muslim societies'.[118]

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[114] Ibid 1441
[115] Badran, 'Re/placing Islamic Feminism', above n 109.
[116] Ibid.
[117] Ibid.
[118] Mahnaz Afkhami and Haleh Vaziri, *Claiming Our Rights: A Manual for Women's Human Rights Education in Muslim Societies* (Sisterhood Is Global Institute, 1996) ii.

Mahnaz Afkhami and Haleh Vaziri point out that the idea for this project grew out of several meetings, discussions and conferences which were sponsored by the Sisterhood Is Global Institute from 1993 onwards. SIGI members Mahnaz Afkhami, Fatima Merrnissi and Nawal El Saadawi as well as some women scholars from Muslim societies first discussed the idea of a 'human rights education model project for women in Muslim societies' in 1993 at a Middle East Studies Association's women's human rights meeting at Duke University in North Carolina. After several conferences sponsored by SIGI, participants stressed the need 'for taking the internationally recognized human rights concepts to Muslim women at the grassroots level'.[119] As Afkhami and Vaziri pointed out, the same point was repeated at the Commission on the Status of Women meetings of March 1994 and March 1995. It became clear to these participants that a 'lack of work on identifying and developing culturally relevant language to convey the message of international human rights documents to Muslim women was a … major impediment to the propagation of the concepts and expansion of women's human rights in Muslim societies'.[120] On the basis of this idea, the SIGI members underlined the need 'for developing models that could use indigenous ideas, concepts, myths, and idioms to explain and support the rights contained in international documents'.[121] The main premise of this project is that 'universal human rights are consonant with the spirit of Islam'.[122] This statement is based on the idea that many Muslims 'believe that Islam contains the essentials of human rights'.[123] Therefore, 'human rights documents must be presented in a dialogue with Islamic tenets, if they are to succeed in Muslim societies'.[124]

The theoretical framework of this model of human rights education is a communication model. Such a model requires communicators, 'a medium, a message, and an audience'.[125] The communicators can be 'women's organizations, human rights organizations, and appropriate government agencies'.[126] Afkhami and Vaziri pointed out that 'Muslim states have historically supported women's human rights as

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[119] Ibid ii.
[120] Ibid ii.
[121] Ibid iii.
[122] Ibid v.
[123] Ibid.
[124] Ibid v.
[125] Ibid vi.
[126] Ibid vii.

a component of their modernization policies'. However, this support has been reduced since the resurgence of militant fundamentalism. Afkhami and Vaziri argued that it is, nonetheless, 'important to mobilize the state in support of women's human rights'.[127] In this sense, as Afkhami and Vaziri argued, the function of 'a human rights education model is to help facilitate state mobilization'.[128] When states are not controlled by fundamentalists, the human rights education model 'ought to help women's organizations and human rights groups to empower the state to confront fundamentalism by opening the political space to women, by affirmative action, and by legal reform'.[129] These goals can be achieved when women's advocacy groups engage in networking and building constituencies.[130] Afkhami and Vaziri pointed out that this kind of activity requires 'a reasonably free and open political environment'.[131]

In the discussion of the audience, Afkhami and Vaziri pointed out that the human rights education model is based on 'interaction, reciprocity of roles, and exchange of positions between communicators and their audiences'.[132] The main objective of this model 'is not to teach a particular truth; it is to establish dialogue'.[133] On the basis of this, the audience can be 'a government agency, a religious group, a village gathering, women in workshop, or family members'.[134]

In discussion of the medium, Afkhami and Vaziri pointed out that there are several possibilities. They include news media, formal and informal organizations, and groups and individuals. As Afkhami and Vaziri pointed out, a good 'medium allows for dialogue'.[135] Radio, TV satellites, the internet and so on make it 'possible for international rights organizations and countries and corporations that control the international media to play an overwhelming role in transmitting the rights message'.[136]

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[127] Ibid.
[128] Ibid.
[129] Ibid.
[130] Ibid.
[131] Ibid.
[132] Ibid viii.
[133] Ibid.
[134] Ibid.
[135] Ibid.
[136] Ibid ix.

Afkhami and Vaziri argued that the message should be designed to be appropriate in 'the existing cultural, political, and technological environments'.[137] Although the messages derive from the international human rights documents, they should be designed in a way that people can understand them.

3. Musawah Framework of Action

As Zinah Anwar points out, the idea of Musawah (which literally means equality in Arabic) was proposed in March 2006 in Kuala Lumpur, Malaysia at a Sisters in Islam International Consultation on 'Trends in Family Law Reform in Muslim Countries'.[138] The participants at that meeting 'felt a compelling need to build an international network of women's groups in Muslim world that have for decades been working on family law to share strategies'.[139] This was needed because many groups 'have not made the hoped-for progress in their reform efforts because they have worked in isolation – at both national and transnational levels – and because of opposition from conservative groups within society and a lack of support from their governments'.[140]

Badran sees the Musawah as an example of secular feminists and Islamic feminists cooperating with each other to advocate for gender equality and social justice in Muslim countries. Musawah 'announced itself as "A global movement for equality and justice in the Muslim Family" at its launch in the spring of 2009 at a large conference in Kuala Lumpur'.[141] Badran calls the project of Musawah '*Muslim holistic feminism*' because it uses Islamic feminist theories of equality and justice based on religious sources, 'together with the secular discourses of democracy and human rights'. So Muslim holistic feminism is a 'multi-stranded discursive approach'.[142] The main purpose of Musawah is to reform Islamic family law in Muslim societies.[143]

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[137] Ibid.
[138] Zainah Anwar, 'Introduction: Why Equality and Justice Now' in Zainah Anwar (ed), *Wanted: Equality and Justice in the Muslim Family* (Musawah an initiative of Sisters in Islam (SIS Forum Malaysia), 2009) 2.
[139] Ibid.
[140] Ibid.
[141] Badran, 'From Islamic Feminism', above n 96 at 83.
[142] Ibid 84.
[143] Ibid.

Musawah declared that the existing Islamic family laws are unjust and frequently ignore Muslim families' and individuals' experiences and lives.[144] Gender inequality is still evident inside Muslim families. Musawah suggests that the achievement of equality in Muslim families is possible, by considering a holistic approach that takes into account many aspects that promote the norms of equality. Women's and men's experiences and lives, universal human rights principles, Islamic teachings, and constitutional guarantees should be brought together as a holistic approach for the strategy of the achievement of equality.[145]

In its Framework for Action, Musawah points out that equality and justice in the family are possible because 'Qur'anic teachings encompass the principles of justice ('*adl*), equality (*musawah*), equity (*insaf*), human dignity (*karamah*), love and compassion (*mawaddah wa rahmah*)'.[146] As Musawah argues, these principles 'reflect universal norms and are consistent with contemporary human rights standards'.[147] Other explanations of how equality and justice in the family are possible were based on Islamic feminism, which was discussed previously in this chapter.

Transnational advocacy networks including WLUML, SIGI and Musawah share some similar strategies with the background-vernacularist approach as I have described it. First, they are based on the view that the religious discourse that constitutes women's inferior status cannot be challenged without adopting another religious discourse that deploys more egalitarian terms. Second, all of them agree that women's equality is possible, if the re-interpretation of religious texts is allowed.

In sum, these transnational advocacy networks are clearly trying to change the cultural background by introducing a different interpretation of religious discourse. But it should also be noted that some of these networks, such as SIGI, have used a strategy similar to vernacularisation.

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[144]   Musawah, *Framework For Action (English)* <http://www.musawah.org/resources/publications/framework_for_action_(English)>.
[145] Ibid.
[146]   Musawah, *Musawah Framework For Action* (2009) 5 <http://www.musawah.org/sites/default/files/Musawah-Framework-EN_1.pdf>.
[147] Ibid 5.

V. Conclusion

In this chapter, I have argued that the background and vernacularist approaches are complementary to each other. I have discussed each approach in some detail to show why this is so. As I showed, the background-vernacularist approach could be considered an appropriate theoretical framework to understand how cultural strategies and discourse can be deployed in the effort to promote women's rights. As I indicated, the background-vernacularist approach is not one single methodology. It does not provide a specific blueprint for change. The background-vernacularist approach can include multiple methodologies and discourses to ensure that international human rights conventions are applied in appropriate ways. It suggests that in order to achieve, for example, the legal and substantive equality of women, one needs to change the cultural norms that create or reinforce views about women's position in society and then translate the relevant human rights norms and principles into domestic legal and cultural norms. The task here is not to change all of the surrounding culture or to challenge the culture per se. Rather, it is an attempt to change or challenge specific cultural norms or social meanings that constitute the inferior status of women. In this way, it is consistent with article 5(a) of CEDAW, which, as discussed in Chapter 7, requires states parties to modify the cultural norms that determine the inferior status of women. So, it does not ask for the entire culture to be changed; it only requires changing the cultural norms and practices that constitute the inferior position of women in a particular society.

In this sense, the background-vernacularist approach does not aim to achieve full acceptance of human rights norms immediately. Rather, it aims to reduce resistance to the application of human rights norms and principles. The background-vernacularist approach is primarily a socio-cultural approach that operates from below, as I will explain in more detail in Chapter 7. It is a dual approach. In simple terms, it involves making strange what had appeared familiar in the cultural norms and practices and at the same time making familiar what had appeared strange in introducing international human rights norms and principles.

At the first stage, in order to make strange what had appeared familiar, this approach suggests that the background of cultural norms or social meanings that establish the inferior status of women should be challenged and deconstructed. The background of

social meanings or cultural meanings are deconstructed or challenged by making them seem strange or at least by showing that such cultural meanings or cultural norms do not produce social justice or fairness in a certain society because there is another story of fairness and justice that can be told. Then the second stage involves telling the other story, the story of vernacularized norms and principles of human rights. In this sense, what had appeared strange, which is international human rights norms and principles, should become familiar because vernacularization means that the international human rights norms are transformed into domestic legal norms and language in order to make them familiar and intelligible for the local ordinary people.

The main examples given in this chapter relate to the theoretical arguments of Islamic feminists and the practical application of such arguments, which have been embodied in transnational advocacy networks such as Women Living Under Muslim Law (WLUML), Sisterhood Is Global Institute (SIGI), and Musawah. As shown in this chapter, their arguments emphasise that women's human rights can be promoted through the deployment of religious discourse in Muslim-majority countries and societies.[148] They argue that this can serve two purposes. First, it can be useful to challenge the cultural background of cultural norms that discriminate against women through deploying the same methods and discourse deployed by religious fundamentalists. Thus, such a method provides women's human rights advocates with tools to give an effective response and critique to fundamentalist discourse and arguments. Second, such a method provides a re-definition of the identity of religious women because it allows them to advocate their equality within their own religious discourse and terms.

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[148] It is beyond of the scope of my thesis to discuss the status of non-Muslims in Egypt and Tunisia. I only focus on how religious tools and discourse have been deployed to enhance women's status in the Islamic context in Egypt and Tunisia.

Chapter 3

The background-vernacularist approach and postcolonial feminist discourse

I. Introduction

In Chapter 2, I introduced the background-vernacularist approach. I suggested that this approach can be used by states parties to CEDAW as a strategy to challenge the cultural background of negative cultural norms and practices and to vernacularize human rights norms and principles in the local legal and social contexts. In becoming a state party to CEDAW, a state is required to change its national law, social policies, administrative law and social practices on the basis of the human rights norms that are stipulated in CEDAW.[1] Like other international human rights conventions, CEDAW does not rely only on changes to national laws.[2] It also aims to change the culture and cultural practices, which leads to changing the customary law of each country.

Following this logic, the background-vernacularist approach complements the aims of CEDAW. The main purpose of the background-vernacularist approach is to reduce resistance to the application of international human rights instruments, especially CEDAW. It suggests that cultural tools should be deployed to dismantle the cultural patterns that determine the inferior status of women in society. I will come back to this issue in Chapter 8.

Having outlined the background-vernacularist approach in Chapter 2, this chapter discusses the relevance of postcolonial theory to the background-vernacularist approach. Postcolonial scholarship has been very important in the discussion about women's situation in non-Western countries, and it is therefore necessary to include some consideration of it in this thesis. The logic of the background-vernacularist

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[1] CEDAW art 2.

[2] Thomas Risse and Kathryn Sikkink argue that international human rights norms could help to change domestic law because international human rights norms challenge 'state rule over society and national sovereignty'. Thomas Risse and Kathryn Sikkink, 'The Socialization of International Human Rights Norms into Domestic Practices: Introduction' in Thomas Risse, Stephen C Ropp and Kathryn Sikkink (eds), *The Power of Human Rights: International Norms and Domestic Change* (Cambridge University Press, 1999) 1, 1–4.

approach emphasises the importance of compliance with international human rights norms. The promotion of human rights is a controversial point for some postcolonial theorists (feminist and non-feminist), however this does not mean that the approach I promote is entirely at odds with the concepts of postcolonial discourse. In fact, the logic of the background-vernacularist approach is consistent with some of the arguments and concepts of postcolonial theory.

This chapter is divided into five parts. Part I is this introduction. Part II gives a brief summary of postcolonial theory. Part III discusses the possible common ground between the background-vernacularist approach and postcolonial theory. This part introduces two concepts presented by postcolonial theorists: hybridity and the subaltern. I argue that these two concepts can be deployed to give a better understanding of how the background-vernacularist approach can be used as a discourse. Hybridity gives a better understanding of what I mean by suggesting that, through the lens of the background-vernacularist approach, any discourse can be framed to challenge its own principles. The 'subaltern' is a useful concept that helps to explain the notion of hegemonic discourse. These two concepts, hybridity and the subaltern, can be considered as common ground that allows my argument about the background-vernacularist approach and postcolonial theory to meet. Part IV introduces Gayatri Spivak's 'Can the Subaltern Speak?' as an example of how some of these postcolonial concepts can be understood through a background-vernacularist lens. Another commonality between the background-vernacularist approach and postcolonial theory is the denial of cultural essentialism, which will be discussed later in this chapter.

Part V discusses the differences between my approach and postcolonial theory. This part focuses on two points: the problem of cultural imperialism and that of the statist approach. The first point relates to the argument put forward by some postcolonial feminist theorists that the idea of the universality of human rights is a continuation of imperialism. However, I argue that use of a background-vernacularist approach does not imply that international human rights norms should simply be *imposed* on non-Western societies. Rather, as I have indicated, non-Western cultural tools and values can be deployed to promote compliance with human rights norms and principles set out in international human rights instruments, especially CEDAW. The second issue is that the logic of the background-vernacularist approach suggests that the states

parties to CEDAW should be among the main players who advocate the advancement of women's equality. In this sense, states should work cooperatively with other players such as the transnational advocacy networks which were discussed in Chapter 2.[3] Some postcolonial feminist theorists, such as Ratna Kapur, have opposed the statist approach because it may put more restrictions on women's freedom and reinforces the idea of their victimization, which in turn invites protectionism. This part presents Kapur's main argument without trying to give a critique of her approach. At the end of Part V, this chapter provides some general notes about a third way that can be taken by postcolonial theory and the background-vernacularist approach.

II.   A summary of postcolonial theory

Postcolonial discourse found its place in Western academia more than fifty years ago.[4] Robert Nichols writes: 'one of the most important intellectual movements of the last fifty years in the Western academy – if not *the* most important – is that which travels under the name "postcolonialism" or "postcolonial studies"'. As Nichols points out, postcolonial studies has not only become a major field of research in its own right, 'it has found its way into central debates in almost all disciplines of humanities and social sciences, English, Comparative Literature, History, Political Studies, Sociology, Anthropology and so on'.[5] Robert Young writes:

> Postcolonial studies has developed that work to give it a disciplinary focus, and foregrounds its significance. For the first time, in a move that was the very reverse to that which Said describes in *Orientalism* (1978), the power of western academic institutions has been deployed against the west. For the first time, in the western academy, postcolonial subjects become subjects rather than the objects of knowledge.[6]

Margaret Davies points out that postcolonialism as a term 'was coined in the 1980s to describe cultures where colonial rule had formally ended'.[7] However, as Davies argues, postcolonialism as a term does not necessarily mean an end to colonialism. She says that 'post' 'does not simply mean *after* colonialism or *beyond* it in any

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[3] In chapters 7 and 8 I will explain in more detail, through the lens of the background-vernacularist approach, the role of the state in enabling the deployment of cultural tools and discourse to take place to promote compliance with CEDAW.

[4] Robert Nichols, 'Postcolonial Studies and the Discourse of Foucault: Survey of a Field of Problematization' (2010) 9 *Foucault Studies* 111.

[5] Ibid 111.

[6] Robert Young, *Postcolonialism: An Historical Introduction* (Blackwell Publishers, 2001) 63.

[7] Margaret Davies, *Asking the Law Question* (Thomson Lawbook Co, 3rd ed, 2008) 306.

simple sense'.[8] Hence, this creates ambiguity about what exactly postcolonial means. Young points out that many problems raised regarding the definition of postcolonial 'can be resolved if the postcolonial is defined as coming after colonialism and imperialism, in their original meaning of direct-rule domination'.[9] Rather than, however, simply adopting postcolonial as a term that means after or beyond colonialism, postcolonial denotes 'the continuation of colonialism in the consciousness of the formerly colonised people and in the institutions which were imposed in the process of colonization'.[10] As Nichols points out, postcolonial theory shares more with, for instance, feminism and queer theory than it does with any other academic discipline, as I will discuss later.[11]

The debate among many postcolonial feminist theorists over Western feminism and Western humanism is frequently circulated within the context of arguments over Marx's famous dictum concerning the French peasantry: they cannot represent themselves; they must be represented.[12] This argument was fleshed out in Edward Said's foundational work, *Orientalism*, which established the field of postcolonial studies. Said writes:

> Flaubert's encounter with an Egyptian courtesan produced a widely influential model of Oriental woman; she never spoke of herself, she never represented her emotions, presence, or history. *He* spoke for and represented her. He was foreign, comparatively wealthy, male, and these were historical facts of domination that allowed him not only to possess Kuchuk Hanem physically but to speak for her and tell his readers in what way she was 'typically Oriental.'[13]

Many postcolonial feminist theorists who reject Western feminism and the international human rights project have constructed their arguments on the basis of Said's critique of those European intellectuals who studied the East in the colonial period. According to Bryan Turner, Said's *Orientalism* gave rise to 'a new approach to decolonization and the writing of history, especially the writing of Indian history'.[14] Subaltern studies in its turn has arisen to embody the discourse of decolonization established by Said's *Orientalism*. In the 1980s, as Turner points out,

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[8] Ibid.

[9] Young, *Postcolonialism*, above n 6, 57.

[10] Ibid.

[11] Nichols, above n 4.

[12] Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte* (Serenity Publishers, 2009).

[13] Edward W Said, *Orientalism: Western Conceptions of the Orient* (Penguin Books India, first published 1978, 2001 ed) 6.

[14] Bryan S Turner, *Orientalism, Postmodernism and Globalism* (Routledge, 1994) 1, 3.

'there were strong intellectual connections between the orientalist debate, subaltern studies and feminism which were all struggles for an authentic voice'.[15] These studies have concentrated on exploring 'the problems of subjectivity and authenticity among social groups or cultures which are excluded from power'.[16]

Many feminists become interested in postcolonial discourse because they consider that the forms of domination of patriarchy and imperialism are similar.[17] In this sense, women's experience in patriarchy can be paralleled with the experience of colonized people. So, both feminists and postcolonial theorists are working to resist such dominance. However, although there are similarities, the oppressions are also quite different in some respects. The debates put forward to consider the impact of colonial oppression on colonized societies revealed parallels with women's experience. This, therefore, has 'led to calls for a greater consideration of the construction and employment of gender in the practices of imperialism and colonialism'.[18]

III.   Postcolonial theory and the background-vernacularist approach: possible common ground

This part considers how some methods and concepts of postcolonial theory may be consistent with the background-vernacularist approach. I focus in particular on the concepts of hybridity and the subaltern.

A.   *The concept of hybridity*

The term hybridity originated in biology.[19] Mikhail Bakhtin introduced it in literary studies to explain representation.[20] For Bakhtin, hybridity is the ability of language to do two tasks at the same time. As Bakhtin argues, language can be represented and

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[15] Ibid 3.

[16] Ibid.

[17] Bill Ashcroft, Gareth Griffiths and Helen Tiffin, *Key Concepts in Post-Colonial Studies* (Routledge, 1998) 101.

[18] Ibid 102.

[19] For more discussion of how the term hybridity has been developed in biology and history see Robert Young, *Colonial Desire: Hybridity in theory, culture and race* (Routledge, 2000) 1–19.

[20] Michaela Wolf, 'The "Third Space" in Postcolonial Representation' in Sherry Simon and Paul St-Pierre (eds), *Changing the Terms: Translating in the Postcolonial Era* (University of Ottawa Press, 2000) 127, 133.

also serve as 'an object of representation' while at the same time continuing to be able to speak to itself.[21] Bakhtin writes:

> What is hybridization? It is a mixture of two social languages within the limits of a single utterance, an encounter, within the arena of an utterance, between two different linguistic consciousness, separated from one another by an epoch, by social differentiation or by some other factor.[22]

Two 'social languages', here, refer to two different styles of communicating within one language such as religious or cultural discourse and human rights or feminist discourse. Hsin-I Cheng points out that hybridization means that words can belong to two different belief systems and two different languages as well as having two different meanings.[23] In this sense, for example, the hybrid discourse can take the following form: religious-human rights discourse or legal-feminist discourse.

What makes hybrid discourse useful is its ability to challenge an authoritative discourse by building on its own concepts and principles and turn it to the advantage of another discourse. I will explain its relevance to the background-vernacularist approach later in this chapter. Michaela Wolf points out, 'one voice is able to unmask the other within a single discourse'.[24] This means that authoritative discourse will be undone.[25] In this sense, languages provide activity to uncover the united authoritative meaning as well as 'creating new forms and content'.[26]

Bakhtin's concept of hybridization was transformed by Homi Bhabha and deployed in postcolonial discourse. In *The Location of Culture,* Bhabha discusses the ambivalent colonial attitude toward colonised people.[27] His main case study was India. Through re-reading the literature written and law enacted by English colonials in India in the nineteenth century, Bhabha reveals the binary oppositions that the colonials repeated and used to legitimize their authority over the colonised countries.[28] Binary oppositions, for Bhabha, such as Master versus Slave, Male versus Female, West

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[21] M M Bakhtin, *The Dialogic Imagination: Four Essays* (Michael Holquist trans, University of Texas Press, 1981) 358.

[22] Ibid.

[23] Hsin-I Cheng, *Culturing Interface: Identity, Communication, and Chinese Transnationalism* (Peter Lang, 2008) 20.

[24] Wolf, above n 20, 133.

[25] Ibid.

[26] Ibid.

[27] Homi K. Bhabha, *The Location of Culture* (Routledge, 1994).

[28] Inci Bilgin Tekin, *Myths of Oppression: Revisited in Cherrie Moraga's and Liz Lochhead's Drama* (Columbia University Press, 2012) 30.

versus East, Centre versus Margin, Lightness versus Darkness, and Self versus Other, were used to reinforce racial stereotypes,[29] and to suggest that black, Asian, and Indian people are inferior to White people.[30] Through this logic, the colonials attempted to justify their existence through emphasising the legitimacy of invading the countries of the Other and controlling them. In this sense, Bhabha explains the colonial narrative as promoting the idea that the Other, who was seen as uncivilized and living in darkness, would be saved by the colonial, who was going to enlighten the darkness and civilize the barbaric.

One of the methods used to achieve this mission was to educate some native people to serve as agents to the colonials. Bhabha gives an example of how the colonial-Christian mission in India converted some Indian people and taught them the English language and the Bible. The purpose of this, for Bhabha, was to achieve two goals. First, the native people, who were Christian Indians, would be able to communicate with other Indians better than the English preachers. This was because the Christian Indians, were Hindus before they converted to Christianity. Thus, they can present arguments and reason with other Indians in their own language. The idea was 'to deploy "natives" to destroy native culture and religion.'[31] Second, having Indians converted to the religion of the colonial, which is supposed to be the light of the darkness, supports the legitimacy of the existence of colonialism.[32] This means that the colonial came to bless the country of the colonised people. So, colonialism is understood as a good thing that happened to the colonised country.[33]

However, Bhabha explains that while this discourse was unfolding, another different discourse was evident as well, which suggested that English is English and Indian is Indian. In this sense, becoming Christian and educated Indian person is a good thing because such a person is better than the native Indian. But, this does not mean that this person will be treated in the same way as an English person because that person is

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[29] Caroline De Wagter, *"Mouths on Fire with Songs".: Negotiating Multi-Ethnic Identities on the Contemporary North American Stage* (Rodopi, 2013) liii-lvi.
[30] Bhabha, *The Location of Culture* above n 27 at 107. For theoretical explanation of how Bhabha explained the stereotype as a colonial tool see Shai Gnisburg, 'Signs and Wonders: Fetishism and Hybridity in Homi Bhabha's *The Location of Culture*' (2009) 9 *CR:The Centennial Review* 229.
[31] Bhabha, *The Location of Culture* above n 27 at 167.
[32] Ibid, 158.
[33] See in general Fetson Kalua, 'Homi Bhabha's Third Space and African identity' (2009) 21 (1) *Journal of African Cultural Studies* 23-32.

Indian.[34] It could be understood in the following way: this black person cannot be treated as a slave because this person is free; but this person cannot be treated as 'white folks' either because this person is not white.[35]

The discussion above may explain Bhabha's statement that '[t]he colonial presence is always ambivalent, split between its appearance as original and authoritative and its articulation as repetition and difference.' [36] What Bhabha reveals besides the ambivalence of colonial presence is the hybrid identity that was created through colonial attempts to be original and authoritative on one hand, and repetitive and different on the other. The hybrid identity, according to Bhabha, that the Christian and educated Indian people adopted, also enabled them to resist the colonial discourse by deploying its social language and questioning its legitimacy, in Bakhtin's sense. This

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[34] This takes a form of the following statement: '"I am English; you are Indian." To be English is to be not-Indian, and vice versa.' Quoted on Neil Larsen, *Determination: Essays on Theory, Narrative, and Nation in the Americas* (Literary Criticism, 2001) 38.

[35] I make an analogy between Bhabha's understanding of the ambivalent colonial attitude toward educated Indian people and the conversation that occurred in the movie *Django unchained* between the master, Mr. Bennett, and his black female slave, Betina. Dr Schultz asks Mr Bennett to tell his slaves to treat Django, who was black slave and freed by Dr Schultz, as a free man. The conversation was as follows:

> *Dr Schultz: Oh,* maybe, while we discuss business, you could provide one of your loveliest black creatures to escort Django here around your magnificent grounds.
> *Mr. Bennett:* Oh, well, absolutely! Betina
> *Betina:* Yessir, Big Daddy?
> *Mr. Bennett:* what's your Jimmie's name again?
> *Dr.* Schultz: Django. Django.
> *Mr. Bennet:* Betina, sugar, could you take Django there and take him around the grounds here and show him all the pretty stuff.
> *Betina:* As you please, Big Daddy.
> *Dr Schultz*: Oh, Mr. Bennett, I must remind you, Django is a free man. He cannot be treated like a slave. He … within the bounds of good taste, he must be treated as an extension of myself.
> *Mr. Bennett*: understood, Schultz. Betina sugar? … Django isn't a slave. Django is a free man, you understand? You can't treat him like any of the other niggers around here, 'cause he ain't like any of other niggers around here. You got it?
> *Betina*: You want I should treat him like white folks?
> *Mr. Bennett*: No. That's not what I said.
> *Betina*: Then I don't know what you want, Big Daddy.
> *Mr. Bennett*: Yes, I can see that. What's the name of that peckerwood boy from town that works with the glass? His mama work over at the lumberyard.
> *Betina*: Oh, you mean Jerry. That's the boy's name. Jerry.
> Mr. Bennett: You know Jerry, don't you, sugar?
> *Betina*: Yes'm, Big Daddy.
> *Mr. Bennett*: well, that's it, then. You just treat him like you would Jerry.

See *Django Unchained film* (Quentin Tarantino, 2012) 30:18-31:31:37.

[36] Bhabha, *The Location of Culture* above n 27 at 153.

hybrid identity was changeable. It held a position between 'colonising and colonised culture'.[37]

Young points out that Bhabha transformed Bakhtin's concept of hybridity to be used as a concept that resists and challenges 'a dominant cultural power'.[38] According to Young, Bhabha translated this moment into a 'hybrid displacing space'.[39] Such a space develops between the native and colonial culture. This in turn had an effect of imposing imperialist culture, which gives it justifications for its claims of authenticity through political and violent means.[40] As Young argues, Bhabba extended his notion of hybridity to include forms of counter-authority, a 'third space' which intervenes to effect

> the 'hybrid' moment of political change. Here the transformational value of change lies in the re-articulation, or translation, of elements that are *neither the One* (unitary working class) *nor the Other* (the politics of gender) *but something else besides* which contests the terms and territories of both.[41]

As I mentioned previously, understanding the presence of hybrid discourse is useful because of its ability to challenge any authoritative discourse by building on the concepts and norms of the authoritative discourse. At the same time, hybrid discourse is used to promote change in the authoritative discourse. For example, as I pointed out in Chapter 1, the first wave of feminism built its discourse on liberal concepts such as freedom and equality. These concepts were used to challenge the authoritative liberal discourse at that time, which was considered by many feminists as male-biased. Liberal-feminist discourse uncovered and unmasked the male-biased in liberalism. But, also, liberal-feminist discourse directed liberal discourse in a feminist direction. A similar story can be told about Islamic feminism, which I discussed in Chapter 2.

I will explain how hybridity relates to the background-vernacularist approach later in this chapter, when I discuss Edward Said and Gayatri Spivak.

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[37] Davies, above n 7, 309.
[38] Young, *Colonial Desire*, above n 19, 22.
[39] Ibid.
[40] Ibid.
[41] Ibid. emphasis in origin.

B.   *The concept of the subaltern*

Another useful concept from postcolonial theory that can be considered consistent with the background-vernacularist approach is the concept of the subaltern. This concept was developed by Antonio Gramsci to refer to those of inferior rank,[42] and was linked to the exercise of power by the ruling classes over inferior groups.

Gyan Prakash points out that *subaltern studies*, which was theorized by Ranajit Guha, derived its project from Marxism 'or from the failure of the realization of the Marxist collective consciousness'.[43] In other words, it derives from the subalterns' failure to act as 'class-conscious workers' to represent themselves in the place of the colonial and nationalist elites' representation of them. It reveals hidden histories by paying more attention to the subalterns who have been silenced by colonial and nationalist elites.[44] Those who developed subaltern studies wished, as Prakash argues, to recover the autonomy and consciousness of subalterns through re-making history. However, they were frustrated by how difficult it was to recover the subalterns' autonomy because 'subalternity by definition, signifies the impossibility of autonomy'.[45]

Marcus Green points out that 'Gramsci's definition and understanding of "subalternity" is directly linked with his conceptions of hegemony and state and civil society'.[46] Hegemony in Gramsci's sense cannot be simply understood as based on alliances that were built with social groups, which were identified with 'the societal project of the dominant class'.[47] Rather, the dominant groups attempt to produce 'hegemonic' discourses that dominate subaltern classes.[48] When the dominant groups are successful in constructing such discourses, these discourses can successfully

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[42] Ranajit Guha, 'Preface' in Ranajit Guha and Gayatri Chakravorty Spivak (eds), *Selected Subaltern Studies* (Oxford University Press, 1988) 35, 36.

[43] Gyan Prakash, 'Postcolonial Criticism and Indian Historiography' (1992) 31/32 *Third World and Postcolonial Issues* 8, 9.

[44] Ibid.

[45] Ibid.

[46] Marcus Green, 'Gramsci Cannot Speak: Presentations and Interpretations of Gramsci's Concept of the Subaltern' (2002) 14(3) *Rethinking Marxism* 1, 4.; for an interesting discussion of Gramscian perspective toward the relationship between the state and civil society see Mary Heath, *The Feral State: A Feminist Critique of the Gendered and Colonialist Theoretical Premises of The 'State'* (PhD thesis, Flinders University, 2003) 221-34.

[47] Munif, below n 48 at 204

[48] Yasser Munif, 'The Arab Revolts: The Old is Dying and the New Cannot Be Born' (2013) 25(2) *Rethinking Marxism* 202, 202–3.

change the 'subjectivities of those they target'.[49] In this sense, the ruling class produces two things at the same time. It produces narratives that appeal to specific subaltern groups. It also produces 'new identities through the interpellation of various social groups'.[50] Hence, it constructs 'a discursive space rooted in common sense; that is, traditional culture and beliefs that do not clash with subaltern groups' worldviews'.[51] Thereby, the dominant ideology 'is constructed with a commonsensical language that subaltern classes appreciate and understand'.[52]

Although this concept was developed to explain how power is physically and normatively exercised by the ruling classes or elites over the inferior classes, the subaltern groups, this concept as it was deployed by Gramsci and later by postcolonial theorists and the field of subaltern studies is consistent with the background-vernacularist approach in several ways. First, subaltern studies turns our attention to the importance of re-reading and re-interpreting the history of specific groups through new perspectives. These new perspectives enable new storytelling to take place, which in turns enables 'the insurrection of subjugated knowledge', in Foucault' sense, as discussed in chapter 2. The subjugated knowledge is the subaltern experiences, of both women and men. This point, a form of standpoint epistemology, is one of the background strategy's steps, as discussed in chapter 2. Second, the concept of the subaltern itself extends our understanding of how dominant authoritative discourse, represents and controls subalterns without allowing their voices to be heard, as will be discussed later in this chapter.

IV. The master's tools together with a critical re-interpretation of those tools can dismantle the master's house

This part attempts to present some Third World postcolonial theorists' arguments, with a particular emphasis on arguments against cultural essentialism. The arguments of such theorists are useful to show how the background-vernacularist approach could be used as a discourse. One of the methods that these theorists use is comparable to Sandra Harding's standpoint epistemology, and involves 'making strange what had

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[49] Ibid.
[50] Ibid.
[51] Ibid 204.
[52] Ibid.

appeared familiar'.[53] In paying close attention to some postcolonial discourse, one finds that it relies on deploying the discourse of either humanitarianism or feminism in order to challenge the historical background. It deploys history to show how Western colonialism was not innocent in its treatment of non-Western countries. In addition, it deploys humanitarian concepts to deconstruct other humanitarian concepts. In this way, it makes the familiar strange by placing history and humanism in a different context.

A. *Deploying a discourse to deconstruct a similar one with the same methods and a different direction*

Edward Said explained this method in a response to James Clifford on the issue of humanism. Clifford questioned 'whether it was possible for Said to continue to profess allegiance to humanism, with its assumptions of subjective agency and will, while embracing the antihumanist tendencies of structuralism and poststructuralism'.[54] Said responded to this critique by writing that 'it is possible to be critical of humanism in the name of humanism'.[55] Similarly, postcolonial theory, in its theoretical-historical trajectory, developed as a response to Western epistemologies that constructed non-European or colonized people as the Other by deploying similar concepts in a different direction.

Postcolonial theorists regard 'European Man' as the centre of 'the humanist notion of a totalizing *universal history*'.[56] Postcolonial theorists argued that the appearance of European Man as the centre of universal history created dualistic thought that created the social concept of race, which also enabled the creation of the 'Other'. Non-European people as the Others became incapable of being subjects of history. Thus, the purpose of postcolonial theory is to deconstruct 'the source of these Western epistemologies, and reconstruct new meanings in discourse and dialogue'.[57] In doing so, it 'has been in the practice of creating its own meaning in language, in order to be

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[53] Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (Cornell University Press, 1991) 150.

[54] W J T Mitchell, 'Divination: Edward Said's Humanism' (2005) 31(2) *Critical Inquiry* 462, 463; also see Edward Said, *Humanism and Democratic Criticism* (Columbia University Press, 2004) 1, 10.

[55] Mitchell, above n 54, 463; see also William V Spanos, *The Legacy of Edward W Said* (University of Illinois Press, 2009) 169.

[56] Alpana Roy, 'Postcolonial Theory and Law: A Critical Introduction' (2008) 29(2) *Adelaide Law Review* 315, 321.

[57] Ibid 322.

able to explain fully its intellectual project'.[58] Hence, postcolonial theorists created a hybrid space, which can be considered a third space or in-between space that 'replaces Western epistemology with an anticolonialist epistemology that is, however, still entangled in Western discourse, its methods, and schemes of validation'.[59]

As a result, it can be understood that when Said suggested that 'it is possible to be critical of humanism in the name of humanism', he was perhaps suggesting that humanist discourse could not be deconstructed if it were not critiqued by another humanist discourse.[60] As Chapter 2 discussed, the background-vernacularist approach suggests that critique needs to be in an idiom or language that can be heard or recognized and therefore adopted.

As discussed above, this method is also in line with Bakhtin's concept of hybridization. Bakhtin's concept focuses on describing the ability of 'one voice to ironize and unmask' the other within the same framework of ideas or words. Hybridization can be understood as a concept that describes the ability of one discourse to criticize and deconstruct an other using the same methods and concepts, but at the same time shifting the direction of the critiqued discourse. It is similar to 'making strange what had appeared familiar' in Harding's sense, and allows change in the cultural background to occur because it produces an alternative story.

As an illustration of such a process, Chapter 2 gave examples of Islamic feminist works in Muslim societies and how they deployed religious discourse to argue against another religious discourse. It can be argued that the people who practise the background-vernacularist approach should be in a hybrid place that allows them to be mediators between two different cultures. As I showed in Chapter 2, Islamic feminists and their transnational advocacy networks can be considered as women's human rights advocates who occupy a third space or a hybrid position. This allows them to

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[58] Ibid.

[59] Kerstin Knopf, *Decolonizing the Lens of Power: Indigenous Films in North America* (Rodopi, 2008) 38.

[60] This does not mean that Said was deploying the background-vernacularist approach or aware of such methods. However, this conclusion is drawn from my understanding of how the background-vernacularist approach can be deployed through understanding some of postcolonial theory's concepts and arguments. For the background-vernacularist approach that I am developing and using as a theoretical framework in this thesis, the critique just needs to be in an idiom or language that can be heard or recognized and therefore adopted.

be considered as not purely religious or purely secular.[61] Further examples of people who have occupied such positions will be discussed in chapters 4 and 5.

However, what I suggest through the background-vernacularist lens is that the discourse of the background is not only challenged; it also produces a hybrid argument inside it. So, it challenges itself and produces a different discourse within it, which is the alternative story of truth, in Hekman's sense, as I will explain in more detail below.

It can of course be tricky to classify discourses – they may be very broadly 'feminist' or 'postcolonial' or 'masculinist', and the boundaries between them are not clear, so it is always going to be hard to classify something as the same or different in terms of its identity as a discourse. In this sense, there is always hybridity in discourse. However, the background-vernacularist approach relies in part on Hekman's suggestions about changing the background or riverbed of thought as a fundamental, core, discourse in any one culture. Hekman does not suggest that feminist discourse has not been successful in its attempt to unmask patriarchy and challenge masculinist discourse. Nevertheless, she suggests that feminists still have work to do in their advocacy of social change and women's empowerment. Hence, she presented the background strategy in order to promote this task. As discussed in Chapter 2, one cannot just critique one truth with a different truth. Rather, one should try to shift the background conditions of social meanings so that an alternative story of truth can be heard and understood. This could be done with a variety of cultural tools, but especially by discursive tools that can be 'heard'.

For a better understanding of how this method can be examined through the lens of the background-vernacularist approach, the following section discusses Gayatri Spivak's influential article 'Can the Subaltern Speak?' The purpose of this section is not to engage in an extended theoretical argument about the feminist concept of

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[61] So for instance in Chapter 2 I pointed out that one strategy of Islamic feminists is to use the core beliefs of Islam to challenge religious fundamentalist discourse. This is a bit similar to liberal feminists using liberal concepts and norms to challenge liberalism, which has been done on many occasions. Liberalism includes a belief in equality, but this is not always reflected in so-called 'liberal' societies. So the core beliefs of liberalism are used to make liberal society more liberal and gender egalitarian. See in general Martha C Nussbaum, 'Perfectionist Liberalism and Political Liberalism' (2011) 39(1) *Philosophy & Public Affairs* 3; Tracy E Higgins, 'Feminism as Liberalism: A Tribute to the Work of Martha Nussbaum' (2010) 19(1) *Columbia Journal of Gender and Law* 65.

agency,[62] or even to analyse Spivak's article critically and comprehensively.[63] Rather, Spivak's article is presented in this chapter in order to interpret some of its arguments through the lens of my theoretical framework. My interpretation of Spivak's article in the following section is therefore selective,[64] and focuses on the way she develops her argument. Spivak's argument about women who commit sati relies on three main concepts: Jean-Francois Lyotard's concept of *differend*, the concept of the subaltern, and women's free will or desire.[65] My main point is that these are Western concepts or idioms and are part of the master's tools in Audre Lorde's sense and, without them, Spivak's argument about sati might not be understood or heard. By using such discourse Spivak has been able to change the grounded knowledge by telling an alternative story of the woman's *sati*-hood and vernacularizing this alternative story in Western scholarship.

B.   Spivak's 'Can the Subaltern Speak?'

As I mentioned above, I am interested on Spivak's argument in a selective way. I am trying to re-read and re-interpret some of Spivak's arguments through the lens of the background-vernacularist approach. Through the lens of this approach, I aim to

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[62] For more discussion of sati and the feminist concept of agency see John Stratton Hawley, *Sati, The Blessing and the Curse*: *The Burning of Wives in India* (Oxford University Press, 1994) 124; Jane Hiddleston, *Poststructuralism and Postcoloniality: The Anxiety of Theory* (Liverpool University Press, 2010) 158; Shaminder Takhar, *Gender, Ethnicity, and Political Agency: South Asian Women Organizing* (Routledge, 2013); Sumi Madhok, *Rethinking Agency*: *Developmentalism, Gender and Rights* (Routledge, 2014) 25; Jocelyn Chua, 'Accumulating Death: Women's Moral and Domestic Economies of Care in South India' in Ludek Broz and Daniel Munster (eds), *Suicide and Agency: Anthropological Perspectives on Self-Destruction, Personhood, and Power* (Ashgate, 2015) 147, 150.
[63] Ilan Kapoor, 'Hyper-Self-Reflexive Development? Spivak on Representing the Third World "Other"'(2004) 25(4) *Third World Quarterly* 627; Mridula Nath Chakraborty, 'Everybody's Afraid of Gayatri Chakravorty Spivak: Reading Interviews with the Public Intellectual and Postcolonial Critic' (2010) 35(3) *Signs: Journal of Women in Culture and Society* 621; Rahul Gairola, 'Burning With Shame: Desire and South Asian Patriarchy, From Gayatri Spivak's "Can the Subaltern Speak?" to Deepa Mehta's Fire' (2002) 54(4) *Comparative Literature* 307.
[64] For a comprehensive discussion of Spivak's 'Can the Subaltern Speak?' see in general Rosalind Morris (ed), *Can the Subaltern Speak?: Reflections on the History of an Idea* (Columbia University Press, 2010).
[65] It should be noted that how to change the master's tools depends on the context. For example, if Spivak's argument was directed to Hindu traditionalists, her discussion might not be understood or appreciated in the form that she constructed it in her article because her argument would require the deployment of Hindu religious concepts and discourse. I am not suggesting that Spivak did not deploy Hindu religious concepts and discourse to explain woman's *sati*-hood *in* her article. Rather, what I am suggesting is that, although Spivak discussed some religious concepts and discourse to illustrate her point, she deployed Western discourse to explain some Hindu religious texts and concepts. She did this in order to make her discussion reasonable and understandable for feminists and human rights scholars and activists. (Spivak did not mention that in her article; this is my interpretation of Spivak's argument through the lens of the background-vernacularist approach.)

highlight two main points. First, Spivak's discussion of the dispute between the British colonials and Hindu traditionalists about the reality of woman and sati provides a good example of the argument that one cannot just critique one truth with a different truth. Second, Spivak's discussion of woman and sati provides a better understanding of how the background of grounded knowledge can be shifted and another story can be told. In this sense, this section attempts to show how Spivak changed the grounded knowledge about women who commit sati ('*satis*') and vernacularized a different point of view about it in Western scholarship.

In Western scholarship, especially in Western feminism, *satis* have been considered as simple victims of patriarchy.[66] There has been little room to provide an alternative understanding of *sati* practice or to see it within a context of women's free will or desire. As Spivak pointed out, *sati* has been considered by feminism and activism as no more than a ritual burning of 'the helpless widow', whom they wanted to save. For Spivak, this explains why there is 'no space from which the sexed subaltern subject can speak'.[67] It should be noted that Spivak did not attempt to justify *sati* practice and she stated that 'obviously, I am not advocating the killing of widows'.[68]

My understanding of Spivak's argument is that she directed her explanation of 'a woman's *sati*-hood'[69] to a Western audience in order to tell an alternative story about *satis*. The alternative story was that woman's *sati*-hood should not be understood as merely a harmful cultural practice. (Spivak did not state her argument in this order because Spivak was questioning the British treatment of the practice of *sati* as a *crime*; this is my explanation of Spivak's argument through the lens of the background-vernacularist approach.) However, Spivak was aware of the difficult task that she was undertaking. In this sense, Spivak was wondering whether is it possible to provide a different point of view about *satis*, while the predominant discourse

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[66] Ruth Bacchus, 'Sati and Performativity: Towards a Western Feminist Understanding of *Sati*' (2013) 28(79) *Australian Feminist Studies* 155. Bacchus writes: 'the ideal sati narrative, contested in many colonial constructions of the sati as a victim, and also sought to be countered in the present, especially by feminist writers and activists who argue *sati* is an act of violence against women produced by a specific nexus of patriarchal, caste, communalist and nationalist politics.' Ibid 158.
[67] Gayatri Chakravorty Spivak, 'Can the Subaltern Speak?' in C Nelson and L Grossberg (eds), *Marxism and Interpretation of Culture* (University of Illinois Press, 1988) 271, 307.
[68] Ibid 301.
[69] I borrowed this term from Bacchus, above n 66, 158.

considers the abolition of *sati* as a good achievement in itself.[70] Furthermore, Spivak found that the dispute between British colonials and Hindu traditionalists about *satis* was irresolvable because each party was arguing from a very different point of view. While the British colonials considered a *sati* as an *object*, who should be protected from her own people, the Hindu traditionalists considered her as a *subject*, whose free will should be respected. Spivak was wondering 'how does one make the move from "Britain" to "Hinduism"?'[71]

My argument is that Spivak attempted to produce a hybrid discourse that can mediate between the point of view that considered a *sati* as a victim and the point of view that considered a *sati* as an agent, who is practising her free will and desire. She did that by deploying idioms heard in Western scholarship to re-interpret some Hindu religious texts. She aimed to change the background of grounded knowledge in Western scholarship about *sati* and make it more understandable. In addition, Spivak was attempting – through her discussion of *sati* – to avoid falling into the trap of the *differend*, which had governed the debate between British and Hindu traditionalists regarding *satis*. (Spivak did not state that in this manner; this is my interpretation of her discussion). She points out that 'what Jean-Francois Lyotard has termed the "*differend*," the inaccessibility of, or untranslatability from, one mode of discourse in a dispute to another is vividly illustrated here'. Thus, the concept of *differend* is a key point of Spivak's argument.

In his explanation of the *differend*, Jean-Francois Lyotard writes:

> A differend … would be a case of conflict, between (at least) two parties, that cannot be equitably resolved for lack of a rule of judgment applicable to both arguments. One side's legitimacy does not imply the other's lack of legitimacy. However, applying a single rule of judgment to both in order to settle their differend as though it were merely a litigation would wrong (at least) one of them (and both of them if neither side admits this rule).[72]

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[70] Spivak, above n 67, 299; I paraphrase the following: 'Given that the abolition of sati was in itself admirable, is it still possible to wonder if a perception of the origin of my sentence might contain interventionist possibilities?'

[71] Spivak considered the argument of Hindu traditionalists that *sati* was a 'patriarchal strategy, which apparently grants the woman free choice as subject', Spivak, above n 67, 299.

[72] Jean-François Lyotard, *The Differend: Phrases and Dispute* (George Van Den Abbeele trans, University of Minnesota Press, 1988) [trans of: *Le differend*] ix.

It has been argued that the *differend* is a dispute that arises 'when each party is employing a form of language (or discourse) incommensurable with the other'.[73] Pierre Schlag writes:

> A differend arises when the regulation of a conflict is done in the idiom of one of the parties – an idiom in which the claims and arguments of the other party cannot be expressed and thus do not register. For Lyotard, our institutionalized idioms, our verification procedures, our mechanisms for adjusting truth, are preestablishing the realities whose truth then assert.[74]

It might be worth mentioning in this context that Lyotard is one of the anti-foundationalist philosophers who assert the non-foundational foundation of the truth. As I discussed in Chapter 2, Susan Hekman invited feminists to pay more attention to the work of anti-foundationalist epistemologists in order to understand how the background approach operates. Hekman drew from the logic of the anti-foundationalist arguments when she pointed out that one cannot critique one truth using another truth, unless the conditions of the background of the first truth are also shifted.[75] Perhaps this is what Spivak was trying to do.

Drawing upon Lyotard's concept of *differend*, for Spivak there were two parties. Each party claimed the truth and argued for it without reaching common ground. The British colonial represented the white man who wanted 'to save brown woman from brown man'. Therefore, such discourse had 'allowed the redefinition [of *sati*] as a crime of what had been tolerated, known, or adulated as ritual'.[76] In contrast, the Hindu traditionalists had strategically granted the subjectivity of *sati* to claim that the 'woman wants to die'. Hence, *satis* were agents and admirable. Each party deployed a discourse that could not be understood by the other party.[77] While this dispute was

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[73] Stuart Sim (ed), *The Routledge Companion to Postmodernism* (Routledge, 3rd ed, 2011) 248.

[74] Pierre Schlag, *Laying Down the Law: Mysticism, Fetishism, and the American Legal Mind* (New York University Press, 1996) 63; Mélanie Victoria Walton, *Expressing the Inexpressible Lyotard and Pseudo-Dionysius: Bearing Witness as Spiritual Exercise* (Lexington Books, 2013) 89.

[75] It should be noted that not all feminists agree with what Hekman is suggesting and she was aware of that, as I discussed in Chapter 2. For more interesting discussion of how some feminists understand Lyotard's concept of *differend* see Caroline Ramazanoglu, 'Saying Goodbye to Emancipation? Where Lyotard Leaves Feminism, and Where Feminists Leave Lyotard' in Chris Rojek and Bryan S Turner (eds) *The Politics of Jean-Francois Lyotard* (Routledge, 2nd ed, 2002) 63.

[76] Spivak, above n 67, 298; Spivak writes: 'In the case of widow self-immolation ritual is not being redefined as superstition but as crime. The gravity of sati was that it was ideologically cathected as "reward," just as the gravity of imperialism was that it was ideologically cathected as "social mission."' Ibid 301.

[77] Spivak writes: 'As the discourse of what the British perceive as heathen ritual is sublated … into what the British perceive as crime, one diagnosis of female free will is substituted for another.' Ibid 300.

going on, the voice of *satis* was marginalized. *Satis'* voice was lost between imperialism and patriarchy because it was a subaltern's voice.

So, the question here is how did Spivak tackle the difficult task of negotiating the *differend*? It is difficult because the predominant discourse in Western scholarship says that *satis* are victims. This means that there is no way to consider woman's *sati*-hood as something other than a harmful cultural practice. Again, I do not suggest that Spivak was trying to justify the practice of *sati*. Also, I do not suggest that Spivak's argument changed the human rights and feminist scholars' and activists' attitude toward this practice. However, I am suggesting that Spivak made woman's *sati*-hood more understandable and she showed that such a practice should not be explained from just one point of view.

In undertaking this difficult task, Spivak re-interpreted some Hindu religious texts such as *Dharmasatra* (sustaining scripture) and *Rg-Veda* (praise knowledge). Through her re-interpretation of these texts, Spivak pointed out that, while sanctioned suicides and self-*sacrifice* of gods (or the nature of the rite for the dead) are unacceptable, 'the self-immolation of widows seems an exception to the rule'.[78] Stephan Morton notes: 'Spivak emphasises that the practice of widow self-immolation is coded as an exceptional sacred practice, or pilgrimage, rather than an act of suicide (which is strictly forbidden in the terms of Hindu religious law)'.[79] In this sense, for Spivak, 'the practice of widow self-immolation is not prescribed or enforced by Hindu religious codes, but is an "exceptional signifier" of the woman's conduct as a good wife'.[80] Thus, Spivak attempts to tell an alternative story or, in Wittgenstein's terms, draw another picture of widow self-immolation. According to her analysis of Hindu religious texts, the case of *sati*-hood should be understood as exercising the choice to be a good wife. This choice was ignored by both the British colonial, who had considered *sati* as a crime, and the Hindu traditionalists, who considered it as merely a desire to die.

Spivak 'concludes that "the subaltern cannot speak" because the voice and agency of subaltern women are so embedded in Hindu patriarchal codes of moral conduct and

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[78] Ibid, 299.
[79] Stephen Morton, *Gayatri Chakravorty Spivak* (Routledge, 2003) 62.
[80] Ibid 63.

the British colonial representation of subaltern women as victims of a barbaric Hindu culture that they are impossible to recover'.[81]

In sum, Spivak's argument takes up a third space. It is a space that previously had no specific cultural identity or position. It did not reflect the position of British colonials because it does not state clearly that *sati*-hood is a harmful cultural practice or should be criminalized. Nor does it reflect purely a Hindu traditionalist position because it does not clearly support the claim that suggested that the woman want to die.

C.   *Unmasking cultural essentialism*

In her important article 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' Chandra Mohanty accuses Western feminists of biased representation of non-Western women.[82] Mohanty argues that Western feminism has appropriated and colonized 'scholarship' and 'knowledge' of Third World women. She points out that Western feminism's 'homogenization and systematization of the oppression of women in the third world' is a kind of power that is exercised by Western feminist discourse. Therefore, she suggests that this power should be defined and named. Mohanty writes:

> I would like to suggest that the [Western] feminist writings I analyse here discursively colonize the material and historical heterogeneities of the lives of women in the third world, thereby producing/re-producing a composite, singular 'third world woman' – an image which appears arbitrarily constructed, but nevertheless carries with it the authorizing signature of Western humanist discourse.[83]

Mohanty is deeply suspicious of the humanitarian objectives of Western feminist writings on Third World women. She believes that Third World women have been incorrectly presented in Western feminist writings. For instance, Mohanty criticizes Western feminist writings that use the example of female genital circumcision in the Middle East and Africa to prove that women in such circumstances are *victims* of their culture.[84]

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[81] Ibid 64; for more discussion see also Janet E Halley, *Split Decisions: How and Why to Take a Break from Feminism* (Princeton University Press, 2006) 96–105.
[82] Chandra Talpade Mohanty, 'Under Western Eyes: Feminist Scholarship and Colonial Discourses' in Chandra Talpade Mohanty, Ann Russo and Lourdes Torres (eds), *Third World Women and the Politics of Feminism* (Indiana University Press, 1991) 50.
[83] Ibid 53.
[84] Ibid.

The Egyptian feminist Nawal El Saadawi's arguments about female circumcision are useful here to interpret the unmasking of cultural essentialism through the background-vernacularist lens. El Saadawi writes: 'I cannot agree with those women in America and Europe who draw sharp distinctions between their own situations and that of women in the region to which I belong and who believe there are fundamental differences'.[85] El Saadawi argues that Western women have no privileged position from which to see non-Western women as different from them. El Saadawi argues that so-called beautification customs in the West, such as breast implants, nose reconstructions, anorexia and so on, are comparable practices to female circumcision. El Saadawi is not attempting to justify the practice of female circumcision because she is very critical of it. Rather, she is trying to counteract the cultural essentialism that determines that non-Western women are seen as necessarily less privileged than Western women because of their culture. El Saadawi writes:

> Women in Europe and America may not be exposed to surgical removal of the clitoris. Nevertheless, they are victims of cultural and psychological clitoridectomy. 'Lift the chains off my body, put the chains on mind.' Sigmund Freud was perhaps the most famous of all those men who taught psychological and physiological circumcision when he formulated his theory on the psychic nature of women, described the clitoris as a male organ … No doubt, the physical ablation of the clitoris appears a much more savage and cruel procedure than its psychological removal. Nevertheless, the consequences can be exactly the same, since the end result is the abolition of its functions so that its presence or absence amount to the same thing. Psychological surgery might even be more malicious and harmful because it tends to produce the illusion of being complete, whereas in actual fact the body may have lost an essential organ … It can create the illusion of being free, whereas in actual fact freedom has been lost.[86]

El Saadawi asserts that women all over the world are facing the same problem in their societies, which is the stereotyping of women's status as inferior to men. Such stereotyping is clarified in Western psychological scholarship.[87] Considering this in the context of the background-vernacularist standpoint, El Saadawi does not attempt to vernacularize female circumcision to make it acceptable in feminist discourse. Rather, El Saadawi attempts to compare female circumcision to beautification in the West. This is in order to explain that both Western and non-Western women are

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[85] Nawal El Saadawi, *The Hidden Face of Eve* (Zed Press, 1980) xv. It can be argued that the illusion of being complete and free, in El Saadawi's sense, can be explained as the lack of self-esteem felt by Western women about their bodies, which leads to self-imposed bodily mutilations/surgery.
[86] Ibid.
[87] Micere Githae Mugo points out that, thanks to the intervention of Nawal El Saadawi a decade or so ago, it has now become fashionable to place cosmetic practices 'on the same footing as female circumcision'. Micere Githae Mugo, 'Elitist Anti-circumcision Discourse as Mutilating and Anti-feminist' (1997) 47 *Case Western Reserve Law Review* 461, 466.

victims of their cultural values, which means that there is no place for essentializing and stereotyping the culture of the other. In this sense, El-Saadawi is attempting to make some familiar western practices and beliefs strange, by comparing them to non-Western culture. Her purpose is to make her argument against cultural essentialism understandable.

V.   Differences between postcolonial and background-vernacularist approaches

Of course, it would be a very large task to explain in detail the consistencies and inconsistencies between the theoretical framework that this thesis develops, which is the background-vernacularist approach, and postcolonial theory. An in-depth explanation is not necessary for the purposes of this thesis. However, some elements of consistency and inconsistency between these different approaches can be highlighted briefly.

A.   Cultural imperialism

First, in the context I am using it, the background-vernacularist approach relies on universal norms and principles of human rights. This means that it is committed to the norms and principles stipulated in international human rights treaties. Such reliance on international human rights might be considered problematic by some Third World feminist and human rights scholars.

The main critique could be formed as follows: if the background-vernacularist approach attempts to change the cultural background of a society in order to make it more receptive to the norms of international human rights treaties, and if this reception can be promoted through the vernacularization of such norms and principles in the local legal discourse, this means that the background-vernacularist approach is an essentialist approach. It is an essentialist approach because it considers that any culture that does not comply with international human rights norms and principles is backward, and therefore should be changed.[88] In other words, one may argue that the

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[88] As discussed in previous chapters, CEDAW does not mandate specific law reform or specific policy directions. Each of the human rights bodies has indicated that steps are to be taken in light of a country's political and legal system. All of the human rights treaties require regional representation on the monitoring committees. This means that the dialogue between those committees and the

logic of the background-vernacularist approach attempts to change the cultural background of each society to comply with international human rights norms. International human rights norms and principles that were stipulated by international human rights treaties cannot, one could argue, be superior to the cultural values of non-Western societies.

If one believes that such norms and principles are superior to other cultural values, as one can further argue, this means that one asserts that Western values, of which the human rights norms and principles are a part, are superior to non-Western cultural values.[89] Eileen Hunt Botting and Sean Kronewitter point out that, if 'an argument for women's rights assumes the superiority of Western culture over another culture', women's rights can be 'a means for justifying cultural imperialism, even though the concept's aim is to liberate all women'.[90] Botting and Kronewitter point out that Chandra Mohanty's argument about 'the construction of women's rights as an instrument of Western reform only contributes to the perception that the indigenous culture is inferior and lacking its own resources for enabling women's empowerment'.[91] Therefore, this is no more than cultural imperialism.[92]

Some Third World postcolonial feminist theorists consider the priority given to human rights concepts an attempt to facilitate cultural imperialism because it supposes that international human rights norms and principles, which are based on Western cultural norms, are superior to the norms and values of non-Western cultures.[93] Therefore, in some postcolonial theorists' sense, the background-vernacularist approach could be seen as a new imperialistic strategy that denies non-Western cultures and reinforces the idea of the backwardness of non-Western cultures.

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jurisprudence developed by the committees have significant input from representatives of the developing world.

[89] Valerie Amos and Pratibha Parmar, 'Challenging Imperial Feminism' (2005) 80 *Feminist Review* 44.

[90] Eileen Hunt Botting and Sean Kronewitter, 'Westernization and Women's Rights: Non-Western European Responses to Mill's Subjection of Women, 1869–1908' (2012) 40(4) *Political Theory* 466, 470.

[91] Ibid 470.

[92] Benjamin Gregg points out that cultural imperialism 'refers to: one belief-system's coercive imposition on another'. Benjamin Gregg, 'Anti-Imperialism: Generating Universal Human Rights out of Local Norms' (2010) 23(3) *Ratio Juris* 289, 292.

[93] Laura Nader, 'Human Rights and Moral Imperialism: A Double-Edged Story' (2006) 47 *Anthropology News* 6; Stefano Semplici, 'Balancing the Principles: Why the Universality of Human Rights is Not the Trojan Horse of Moral Imperialism' (2013) 16(4) *Medicine, Health Care and Philosophy* 653.

In a response to this expected claim, I would argue that the background-vernacularist approach does not necessitate that a hostile position is taken towards any culture. It is, on the contrary, consistent with the postcolonial feminist argument against cultural essentialism. The background-vernacularist approach suggests that, although any culture including its religion (and including Western culture), might have negative norms and principles that may reinforce the violation of women's human rights and stereotype them as inferior to men, it also has positive principles and norms that can enable compliance with the view that human rights are universal and should be promoted and protected. Therefore, the logic of the background-vernacularist approach is to suggest that cultural norms and values should be deployed to promote human rights. Human rights provide benchmarks that, while not perfect or necessarily neutral culturally, are still useful and strong statements about appropriate standards.[94]

The background-vernacularist approach is selective in how it deals with changing the cultural background and vernacularizing human rights norms. For example, the background-vernacularist approach focuses only on changing the cultural norms and social meanings that constitute the inferior status of women and encourage harmful cultural practices. It does not suggest that non-Western culture should be identical to Western culture. It also does not suggest that international human rights norms and principles should be imposed on non-Western societies. Rather, it suggests that both Western and non-Western societies should comply with international human rights norms and principles by deploying their own cultural tools.

B.   *The statist approach and treating women as victims*

The background-vernacularist approach asserts the importance of a statist approach to ensure compliance with international human rights treaties. Some feminist legal scholars and some human rights scholars find this reliance on the state to promote women's human rights problematic.[95] Many feminist legal theorists have argued that

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[94] As of the 1980s the majority of the world's countries have participated in the drafting of these norms, have decided to sign up to the treaties and therefore subject themselves to questioning by the various committees and, with the decision to have Universal Periodic Reviews at the Human Rights Council, have agreed to be judged on their adherence to these norms. Therefore the focus here is on how best to implement these norms, and how best to work with countries, rather than making a judgement about what is superior or inferior.
[95] The background-vernacularist approach is consistent with some legal feminist arguments that suggest that the law is not the main source of empowerment of women. Therefore, as discussed in previous chapters, the background-vernacularist approach can be considered both a politico-legal

the law cannot be the main source of women's empowerment.[96] The background-vernacularist perspective is consistent with this because, as I will discuss in Chapter 7, it is *mainly* a socio-cultural approach. But this is usually not sufficient. As I will argue in Chapter 7, a politico-legal approach is also required for change to be effective. However, some postcolonial feminists have argued that the politico-legal approach may constrain the empowerment of women because it gives the state more room to control women's freedom. The most obvious example of such an argument can be found in Ratna Kapur's work.[97] Kapur provides a better understanding of how viewing women as victims may reinforce both gender essentialism and cultural essentialism. Furthermore, Kapur also provides a better understanding of how some postcolonial feminists conceive the international human rights system and the statist approach.

Although Kapur discusses some aspects of the international human rights system, particularly regarding protection of women from violence, she does not discuss CEDAW, which is the main theme of this thesis. Therefore, Kapur's argument will be presented in this chapter as a summary and my response to some of Kapur's arguments will be a general response to her discussion of the inadequacy of the statist approach. Further discussion of how the statist approach can be useful for promoting women's rights can be found in the discussion of Tunisia in Chapter 5.

1.   Women as victims

Kapur argues that positioning women only as victims cannot assist the empowerment of Third World women.[98] Specifically, relying on the notion of Third World women as victims invites essentialism and offers an opening to protectionists, including the

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approach and a socio-cultural approach. In addition, the background-vernacularist approach does not suggest that non-governmental organizations or social groups that support women's human rights should be excluded from this process, just that the state is the main actor in this approach.

[96] Carol Smart, *Feminism and the Power of Law* (Routledge, 2002); Mary Becker and Cynthia Grant Bowman, *Cases and Materials on Feminist Jurisprudence: Taking Women Seriously* (Thomson/West, 2007); John Hardwig, 'Should Women Think in Terms of Rights?' (1984) 94 *Ethics* 441; Isabelle Barker and Jasbir Kaur Puar, 'Feminist Problematization of Rights Language and Universal Conceptualizations of Human Rights' (2002) 5 *Concilium International Journal for Theology* 608; Wendy Brown, *States of Injury: Power and Freedom in Late Modernity* (Princeton University Press, 1995); Sari Kouvo and Zoe Pearson (eds), *Feminist Perspectives on Contemporary International Law: Between Resistance and Compliance?* (Hart, 2011).
[97] Ratna Kapur, 'The Tragedy of Victimization Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' (2002) 15 *Harvard Human Rights Journal* 1.
[98] Ibid 6.

state and the religious mainstream. Kapur suggests that instead, Third World women's rights may be advanced through the normal means of agency and resistance. This maintains respect for Third World women at both national and international levels. Following this strategy, Third World women could block interference into their issues from within and without. By so doing, Third World women feasibly establish their own political project for emancipation, which would bring about their empowerment.

Kapur argues that when women utilize a victimization narrative in their battle against violence, they also invite their protectors to involve themselves in possible remedies and responses. These potential protectors could, for example, be states that 'have little to do with promoting women's rights'.[99] Asking for such remedies and responses from states through the criminal law may undermine the advancement of women's rights. The state may enact conservative policies and justify them as protections for women. As Kapur argues, the victim subject position adopted in campaigns against violence against women invited 'protectionist, and even conservative, responses from states'. The focus on violence against women, Kapur argues, 'has triggered a spate of domestic and international reforms focused on criminal law, which are used to justify state restrictions on women's rights – for the protection of women'.[100]

Kapur believes that campaigns against anti-women violence that rely on a conception of the victim subject 'have taken feminists back into a protectionist and conservative discourse'.[101] It is better, as Kapur suggests, for Third World feminists to seek the advancement of women's rights through political movements that oppose the state and challenge imperialist intervention that essentializes Third World women.[102] Drawing upon the notion of cultural essentialism, Kapur points out that Third World women have been portrayed by Western feminists as underdeveloped, poor women who are victims of their culture, whereas Western women are seen as developed and liberated.[103] Kapur argues that this image of Third World women has invited Western

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[99] Ibid.
[100] Ibid.
[101] Ibid 7.
[102] Kapur writes: 'addressing crimes against women without simultaneously addressing their lack of civil rights assumes that the cause and the cure for violence lies with the state, specifically in the guise of the criminal law. By falling into the "sovereignty trap," feminists have failed to address the power eruptions occurred as a result of global integration and market activity.' Ibid 34–5.
[103] Kapur here deploys Chandra Talpade Mohanty's argument in her influential work 'Under Western Eyes: Feminist Scholarship and Colonial Discourses', above n 82.

feminists to propose imperialist strategies that may favour the intervention of conservative and powerful governments into Third World women's lives. This image, as Kapur argues, could ultimately work in favour of conservative states because it legitimizes restrictions on women's rights.[104]

Although Kapur's argument is based on countering the narrative of victimhood of Third World women in campaigns against violence against women, because this reinforces cultural essentialism and supposes that Western women are less victimized than non-Western women, Kapur's argument opposes the statist approach and its logic. It opposes the statist approach, for the empowerment of women. Kapur's central argument is concerned with the idea that non-Western women, especially Indian women, should not be considered victims of their culture because the emphasis on the victim position will invite protectionists who could be religious leaders and part of the state's apparatus.

For a better understanding of this, it might be useful to consider some Kapur's other work on sexual security.

2. Sexual security regime

In her recent work, 'Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India', Kapur examines three areas of international law: trafficking in international human rights law, wartime rape in international criminal law, and 'the "taming of gender" in the context of Security Council resolutions 1325[105] and 1820[106] on gender, peace, and security.[107] She examines these areas in order to show how responses to the 'Delhi rape' case invited a statist response to sexual violence against women.[108] She shows how feminists and human rights activists failed by appealing to the state as the dominant guardian of

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[104] See also Kapur's argument about migrant sex workers in Ratna Kapur, 'Post-Colonial Economies of Desire: Legal Presentations of the Sexual Subaltern' (2001) 78(4) *Denver University Law Review* 855.

[105] SC Res 1325, UN SCOR, 4213th mtg, UN Doc S/RES/1325 (31 October 2000).

[106] SC Res 1820, UN SCOR, 5916th mtg, UN Doc S/RES/1820 (19 June 2008).

[107] Ratna Kapur, 'Gender, Sovereignty and the Rise of a Sexual Security Regime in International Law and Postcolonial India' (2013) 14 *Melbourne Journal of International Law* 317.

[108] For the story of the Delhi rape case see Muneeaza Naqvi, 'India Gang Rape Suspects to Appear at Hearing', *The World Post* (online), 14 January 2013 <http://www.huffingtonpost.com/2013/01/14/india-gang-rape-suspects-hearing_n_2470962.html>; Harmeet Shah Singh, Jethro Mullen and Sumnima Udas, 'Court Sentences 4 Men to Death in New Delhi Gang Rape Case', *CNN Online*, 14 September 2013 <http://edition.cnn.com/2013/09/13/world/asia/india-gang-rape-sentence/>.

women's rights. She addresses the failure of feminists and human rights activists to acknowledge that women's empowerment cannot be achieved in a top-down manner.

Kapur's argument about the inadequacy of contemporary international law approaches to promote Third World women's rights derives from 'the critiques made by Third World Approaches to International Law ("TWAIL") scholarship as well as postcolonial theory'.[109] Kapur points out that the first generation of TWAIL intellectuals paid attention to how Third World nations were excluded from the practices of international law in its early phases.[110] As explained by TWAIL scholars, Third World nations were prevented from gaining freedom from colonial states because of the legal concept of sovereignty. TWAIL has shown 'how the dominant narrative of sovereignty has been constructed against a denial of sovereignty to peoples who remained under colonial rule'.[111] This, in turn, enabled 'the continued economic and political power of the colonial rulers'.[112] The following generation of TWAIL scholars, Kapur points out, gradually began to focus on how international law 'has become an agent for globalisation and for the implementation of neoliberal market reforms'.[113] Kapur suggests that 'TWAIL needs to be located within the tradition of the broader theoretical school of postcolonial theory and the subaltern studies project'[114] because these projects have questioned liberal doctrines and the relationship between 'power and colonial knowledge-production'.[115] Kapur further points out that these projects 'interrogate the assumptions about the "Other" against which knowledge-production operates as well as the understandings of agency and the resistive subject that have emerged in response to the pressure of the colonial encounter'.[116] Kapur claims that postcolonial feminists have revealed how the

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[109] Kapur, 'Gender, Sovereignty', above n 107 at 321.
[110] Ibid 323; see also Frederick E Snyder and Surakiart Sathirathai (eds), *Third World Attitudes toward International Law: An Introduction* (Martinus Nijhoff, 1987), cited in Kapur, ibid 323.
[111] Kapur, ibid 322.
[112] Ibid.
[113] Ibid 324.
[114] Ibid.
[115] Ibid.
[116] Ibid. See also Edward W. Said, 'Representing the Colonized Anthropology's Interlocutors' (1989) 15 *Critical Inquiry* 205.

gendered 'Other' is regularly seen as 'even more victimized, vulnerable and in need of protection than her First World counterpart'.[117]

In her discussion of gender in international law, Kapur claims that the interventions of feminists have benefited states rather than women because they have strengthened law enforcement, especially border control, and at the same time they have curtailed the sexual expression and speech of women. Kapur further points out that 'appropriating gender to strengthen the security apparatus of the state serves the state's priorities of market efficiency and stability'.[118] Kapur concludes that the international and local responses to sexual violence against women produced more restrictions on sexual subjects.[119] She does not see this as a victory for women's rights because these responses have strengthened the 'surveillance techniques that have regulated sexual subjects while falling short of conferring juridical entitlements on a fully legible subject'.[120]

C.   *Some notes toward a third way*

Having mentioned what I believe might be the main points of contention between the background-vernacularist approach and postcolonial feminist discourse, it might be helpful to consider briefly a third way.

The system of human rights is politically, morally, and theoretically attractive because it has been adopted by many states.[121] The international human rights system, which

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[117] Kapur, 'Gender, Sovereignty', above n 107 at 331; see also, Kapur, 'Tragedy of Victimization Rhetoric', above n 97. It might be true that postcolonial theory is useful, as Kapur explained. However, postcolonial discourse does not seem to propose a workable strategy to protect human rights in Third World countries. This discourse is preoccupied with the past. It does not have a humanitarian project that can be presented to Third World people whom it attempts to protect from imperialism. Opposing humanitarian projects proposed by the West because they are from former colonial countries does not seem to help Third World people. It leaves some Third World people in the hands of oppressive regimes without giving them any help from outside. It seems that it invites oppressive regimes to ignore the international human rights treaties to which they are already states parties. One may wonder why some postcolonial discourse considers humanitarian initiatives and treaties as imperialism, and not the economic treaties. For more discussion of critiques of postcolonial theory see Christine Sylvester, 'Development Studies and Postcolonial Studies: Disparate Tales of the "Third World"' (1999) 20(4) *Third World Quarterly* 703; Rajeswari Sunder Rajan, 'The Third World Academic in the Other Place; Or the Postcolonial Revisited' (1997) 23 *Critical Inquiry* 596; Arif Dirlik, 'The Postcolonial Aura: Third World Criticism in the Age of Global Capitalism' (1994) 20 *Critical Inquiry* 329.
[118] Kapur, 'Gender, Sovereignty', above n 107, 332.
[119] Ibid 342.
[120] Ibid.
[121] Mark S Ellis, Anver M Emon and Benjamin Glahn, *Islamic Law and International Human Rights Law* (Oxford University Press, 2012) 35; Karen da Costa, *The Extraterritorial Application of Selected*

was accepted by states voluntarily, obliges its states parties to make necessary measures and efforts to criminalize violations of human rights and to change their laws and modify their cultural patterns to eradicate such violations. In this way, the background-vernacularist approach provides some strategies for promoting rights.

The question of whether the norms and principles of the international human rights system are Western-centric and reinforce cultural imperialism may not be helpful. This is because cultural imperialism – the hegemonic discourse of the ruling class in Antonio Gramsci's sense – which accompanied the era of colonialism, is different from the human rights discourse encouraged by the international human rights system. What can be said in response to the claim that the background-vernacularist approach may facilitate or rationalize cultural imperialism echoes what Nancy Kim said about the cultural relativists' argument about Western feminism. Nancy Kim states:

> The relativist comparison of feminism with colonialism is flawed because it ignores the difference between coercion and autonomous decision-making. It confuses the desire to change with forced change, and mistakes societal constructs and the status quo for the natural order. The cultural imperialism that accompanied colonialism forced changes against the will of the people. This resulted in the stripping away of cultural identity. Feminism, on the other hand, is a product of the gradual process of social evolution. Women from Western industrial countries are not marching into developing non-Western countries and forcing the local women to accept Western feminist ideas.[122]

Kim's argument is slightly different from what I have argued for in the name of a background-vernacularist approach, because the latter suggests that states parties to international human rights conventions should make efforts to promote human rights norms and principles in their society. However, it can be helpful to acknowledge Kim's views here because the background-vernacularist approach is primarily a socio-cultural approach, as I will discuss in Chapter 7. It does not attempt to change every aspect of a culture or to westernize non-Western cultures. Rather, as I will discuss in Chapter 8, it only focuses on challenging or at least modifying the cultural norms or social meanings that constitute the inferior status of women, which undermine their enjoyment of their human rights. But this approach is not sufficient

Human Rights Treaties (Martinus Nijhoff Publishers, 2012) 76; Rhona K M Smith, *Textbook on International Human Rights* (Oxford University Press, 2014) 164; Olivier De Schutter, *International Human Rights Law: Cases, Materials, Commentary* (Cambridge University Press, 2014) 14.
[122] Nancy Kim, 'Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism' (1993) 25 *Columbia Human Rights Law Review* 49, 95.

because it requires a politico-legal approach as well, as it will be discussed in Chapter 7. This leads to the second point, which is the importance of the statist approach for the protection of women's human rights.

As shown previously, Kapur's argument is not easy to refute because it includes many persuasive points such as the call to deny the victim status of women, which reinforces gender essentialism and cultural essentialism. Kapur's advocacy for freeing women from the hegemonic discourse of the ruling classes in Gramsci's sense is a useful argument. However, seeking the promotion of women's human rights through a collective women's movement that opposes the state may only be partially effective because women's human rights issues, as this thesis argues, are not only a matter of law. They are also a matter of culture. Without establishing a socio-cultural strategy that challenges the cultural norms that constitute women's inferior status in society, which can be accompanied by a statist approach that eradicates women's human rights violations, women's rights will be jeopardized. Any socio-cultural gains need to be consolidated and symbolically reinforced by law. Otherwise they will remain fragile and potentially under threat both from the state and from conservatives.

VI.   Conclusion

The main argument of this chapter is that the background-vernacularist approach could be used as a discourse to promote change for women. I have used postcolonial feminist discourse to deepen my analysis of aspects of the background-vernacularist approach. There is no doubt that postcolonial feminist discourse is still a powerful tool for many marginalized and oppressed groups. This chapter, therefore, did not attempt to criticize postcolonial feminist discourse in detail. Rather, it attempted to show that postcolonial feminist theory would not be effective if it did not deploy some concepts and discourse derived from Western feminism.[123]

I would suggest that postcolonial feminist discourse is a hybrid discourse that resists the hegemonic discourse. It therefore assists vernacularization because it reframes a problem in a language which is already understood in a particular context. This method has also enabled postcolonial non-feminist and feminist theorists to challenge

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[123] Relevant feminist concepts include agency, gender essentialism, cultural essentialism, patriarchy, women's control over their bodies, and the inability of law to achieve women's empowerment on its own.

the cultural background of social meanings in humanist and feminist scholarship. It enabled them to re-define and re-interpret such concepts to be able to make strange what had appeared familiar or vice versa, which is making familiar what had appeared strange. Drawing upon this conclusion, as I suggest, in order to enable the promotion of women's human rights norms and principles to take place in Egypt and Tunisia, cultural tools should be deployed to change the cultural background and to vernacularize the human rights norms and principles in the local context. Cultural tools as the master's tools, in the feminist sense, should be subject to frequent re-interpretation and examination, while they are used to change the cultural background.

In conclusion, postcolonial theory provides powerful tools to deconstruct the dominant discourse in any given situation. Its power derives from its attempts to unmask the colonialist mentality through re-reading the history of colonialism through the lenses developed by postcolonial theorists. Postcolonial theory's tools and concepts are very useful as tools to subvert the powerful or dominant discourse. The logic of the background-vernacularist approach can be consistent with many concepts of postcolonial theory. However, if postcolonial theorists pay close attention to how non-Western cultures can be modified to be consistent with international human rights norms, postcolonial discourse will be more effective for marginalized and disadvantaged people.

The next two chapters discuss aspects of the historical intellectual movements in Egypt and Tunisia that prepared the way for the emergence of feminism in the Arab world. Chapter 4 discusses the historical turning points of the women's rights movement in Egypt. It shows how cultural tools, including religious tools, were deployed in arguments to improve women's status in Egyptian society. In addition, it attempts to show that the state's willingness played a notable role in this mission. Following the discussion of Egypt in Chapter 4, Chapter 5 discusses the historical turning points of the history of women's rights in Tunisia. Chapter 5 attempts to show that Tunisia can be considered the main Arab country that deployed cultural tools and discourse to advance women's status because it adopted religious tools and discourse to reform family law.

Chapter 4

Egypt – paving the way for ratification of CEDAW

I. Introduction

As I discussed in Chapter 1, culture has been identified by many states parties, including Egypt and Tunisia, as the main barrier to full compliance with CEDAW. As we have seen, a better understanding of the deployment of culturally-informed interventions may help states parties to develop long-term strategies to promote compliance with CEDAW. For this purpose, this thesis attempts to develop a theoretical framework that will enable us to understand how cultural tools and values can be deployed to promote change in obstructive cultural norms and values, and to promote compliance with CEDAW by vernacularizing its norms and principles in the local legal and social discourse. To this end, I have proposed a theoretical framework that I call the background-vernacularist approach.

In this chapter I attempt to show how pro-feminist intellectual historical movements can be interpreted in the light of what I have called the background-vernacularist approach. Looking at what was done through a modern theoretical framework allows me to interpret it in a particular way, namely, as changing the background and vernacularizing human rights.

This chapter explores the main turning points in the history of Egyptian feminism that prepared the way for Egypt to sign and ratify the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). It attempts to understand some of the complicated effects of this history on women's status in Egypt. In investigating the pre-CEDAW history of the Egyptian feminist movement, and examining its main historical turning points, this chapter shows how cultural tools and discourse had already been deployed for the relative advancement of women's status in Egypt. It also adds support to the next stage of the argument, that the deployment of cultural tools and values through the background-vernacularist approach is important for understanding what the possible strategy for the application of CEDAW should include, as I will discuss in Chapter 8.

It is worth mentioning that this thesis focuses on article 5(a) of CEDAW, which encourages the states parties to eliminate the social and cultural norms that negatively

affect the ability of women to achieve equality. Article 5(a) will be discussed comprehensively in Chapter 7. Thus, my focus is not to discuss specific issues affecting women, such as domestic violence or constitutional guarantees of equality. Although this thesis may refer at times to such issues, it is not primarily devoted to discussing them. My main focus is to understand how the cultural background of the inferior status of women can be changed in order to vernacularize the norms and principles of women's human rights in the local legal and social context. In this chapter, therefore, I do not attempt to discuss the legal or social position of women in Egypt. Nor do I attempt to make an exact comparison between the history of the feminist movement in Egypt and elsewhere in the world.

The main purpose of this chapter is to examine how we can understand the critical role of the deployment of cultural tools and idioms in a more general sense in the history of Egyptian women's human rights advocacy before Egypt became a signatory to CEDAW, and how the state influenced that history. Using the background-vernacularist approach as an interpretive lens, I consider together the state's willingness to support women's rights and the deployment of cultural tools and discourse. This is because, as I will discuss in this and the next chapter, the Egyptian and Tunisian governments have encouraged the deployment of religious discourse, which is one powerful cultural tool that can be used to enhance women's status. They prepared the way for this changed use of religious discourse by weakening the role of religious institutions, which were the main cultural establishment that was attempting to maintain the *status quo* of women's situation. The state's willingness to facilitate change is important because the state can be considered 'the central bank of a symbolic credit' in Pierre Bourdieu's sense, as I will explain later.[1]

Consequently, the purpose of this chapter is not to provide a comprehensive analysis of the history of Egyptian political, legal or feminist movements. I only intend to highlight some of the main historical turning points of Egyptian women's rights advocacy before Egypt become a state party to CEDAW. One aim of this chapter is to understand the position of women and the understanding of women's rights that informed the government's willingness to ratify CEDAW. Another aim is to provide

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[1] Pierre Bourdieu, *The State Nobility: Elite Schools in the Field of Power* (Stanford University Press, 1996) 376.

an overview of some movements and ideas which are part of Egyptian society to show that something similar to the background-vernacularist approach has been used in the past and therefore it would not be a large leap to assume it could be used in the future both by the government and civil society, as I will discuss in chapters 7 and 8.[2]

Part II of this chapter discusses some Egyptian religious intellectuals who prepared the way for the emergence of Egyptian feminism. In this part I re-interpret some works of these intellectuals through the lens of the background-vernacularist approach. For example, Rifa'a al-Tahtawi's arguments presented in this chapter provide a good understanding of how a hybrid position can be occupied by a vernacularizer of human rights norms and principles. Furthermore, the discussion of Mohammed Abduh and Qasim Amin shows how the background approach, discussed in Chapter 2, can operate in the Islamic-Arab context. I re-interpret some arguments of these intellectuals through the lens of the background-vernacularist approach in order to show that cultural tools and values, one of which is religious discourse and the use of *ijtihad*, have been used in arguments to enhance women's status in Egypt. I will explain later why I have chosen these three male religious intellectuals in particular. This discussion also lends support to the view that the state has a significant role to play in promoting women's rights.[3]

Part IV of this chapter looks at the main turning points in the history of Egyptian feminism that prepared the way for Egypt to sign CEDAW in the 1980s. In this part, I highlight the main feminist women's groups that played a role in the women's rights

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[2] Furthermore, although I will discuss Egypt's signatory on CEDAW and the reservations that it made to CEDAW later in this thesis, the discussion in this chapter may enable us to understand the Egyptian position toward CEDAW when I discuss it in chapter 6. Egypt's position seems ambivalent because, like many other Islamic states parties to CEDAW, when Egypt agreed to ratify CEDAW, it made reservations to some of its articles based on religious justifications. At the same time, while Egypt maintains reservations to some of CEDAW's articles, Egyptian national reports and Egyptian delegations frequently assert that there is no conflict between Islamic Sharia and CEDAW. I will come back to this point in Chapter 6. The apparent ambivalence of this position can be analysed and clarified using a background-vernacularist approach. One of the clarifications that this chapter attempts is that, even if religious justifications have been deployed by Egypt to make reservations to some of CEDAW's articles, religious justifications and tools have also been deployed for the advancement of women's status in the history of the Egyptian women's human rights movement.

[3] For example, as I will discuss, the Egyptian government from the beginning of the new nation-state, in the era of Muhammed Ali in the nineteenth century, used symbolism that encouraged some intellectuals to connect the advancement of women's status to the progress of the state. In other words, some intellectuals, such as Qasim Amin who will be discussed in this chapter, suggested that promoting the status of women is one of the major reasons, if not the only one, for the progress and strength of the state.

movements in the history of Egypt. I do not attempt to provide a comprehensive analysis of the historical activism of such feminist groups or movements. Rather, I attempt to address the main turning points in their history, which were influenced by the changing governments and their role in women's rights advocacy. I also briefly address the emergence of women's groups established by the Muslim Brotherhood. The purpose of introducing discussion of such women's groups is to differentiate between them and Egyptian feminist groups. This differentiation is based on their objectives and the definition of feminism, as I will discuss later. Finally, I briefly address how the Islamist movement influenced the state legislative and constitutional reforms from the 1970s until Egypt's ratification of CEDAW.

All these points may provide us with a better understanding of the position taken by Egypt toward CEDAW and prepare the way for the discussion of the Egyptian reservations in Chapter 6 and of its compliance with article 5 in Chapter 7.

II. Preparing the way for cultural change and the emergence of Egyptian feminism

Michele Brandt and Jeffrey Kaplan point out that, although Egypt 'has long represented one of the Arab world's most secular and cosmopolitan societies', the legal status 'of women in Egypt with regard to such matters as family, divorce, custody of children and inheritance has progressed in fits and starts'.[4] Margot Badran points out that, earlier 'in the [nineteenth] century, after freeing Egypt from direct Ottoman rule, the new ruler, Muhammad Ali, while consolidating his power, had placed the Islamic establishment centered at al-Azhar under the control of the state'.[5] This move was based on the motivation of the state at that time to modernize and secularize education and the law. It can be argued further that the Egyptian authorities

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[4] Michele Brandt and Jeffrey A Kaplan, 'The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh, and Tunisia' (1996) 12 *Journal of Law & Religion* 105, 110.

[5] Margot Badran, 'Competing Agenda: Feminists, Islam and the State in Nineteenth- and Twentieth-Century Egypt' in Deniz Kandiyoti (ed), *Women, Islam and the State* (Temple University Press, 1991) 201, 201. In defining al-Azhar, Lila Abu-Lughod writes:

> [al-Azhar is] the major religious establishment of Egypt (and the wider Muslim world). A mosque and university that has been the seat of Islamic learning since the eleventh century, al-Azhar has also become one of the important voices of official Islam, with its tangled relationship to the state in the twentieth century.

Lila Abu-Lughod, *Local Contexts of Islamism in Popular Media* (Amsterdam University Press, 2006) 10.

did this because of their political objective to control the religious field. However, personal status law, which governed women inside and outside the family, was left to religious institutions to govern according to Islamic Sharia.[6]

In order to effectively govern the religious field, which also at that time involved governing the educational field, Ali's government seized land belonging to religious institutions, known as endowment land or *waqf*. It also built a secular education system that competed with the religious schools. As a consequence, as Lama Abu-Odeh argues, 'the Ulama [religious scholars] found themselves being demoted from being institutionalized elites to being alienated and disenfranchised'.[7] Abu-Odeh wrote further: 'Ali not only ravaged the *Ulama's* financial institutions, but he also started to build an educational system to compete with and take the place of the religious one that the *Ulama* historically controlled'.[8]

According to Tamir Moustafa, Ali reorganized and nationalized the ownership of 623,000 acres of *waqf* lands 'that had previously financed mosques and religious schools'. This occurred again during Gamal Abdul Nasser's government in the 1950s, when he placed all 'waqf land (a full 12% of all arable land) under the control' of the Ministry of Endowments.[9] The secularization of the legal system and education in Ali's and Nasser's governments, however, did not imply the secularization of personal status law, which governs the main legal status of women. This was left to the religious institutions or religious 'field' in Pierre Bourdieu's sense, as I will explain shortly.

Leaving women's legal status to be governed under Islamic family law, while secularizing and modernizing other laws, has created dualistic identities for women. Badran explains that this has created for women 'an awkward dichotomy between their role as citizens of the nation state (*watan*) and as members of the religious community (*umma*)'.[10]

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[6] Mohamed Younis, 'Daughters of the Nile: The Evolution of Feminism in Egypt' (2007) 13 *Washington and Lee Journal of Civil Rights and Social Justice* 463, 464.
[7] Lama Abu-Odeh, 'Modernizing Muslim Family Law: The Case of Egypt' (2004) 37 *Vanderbilt Journal of Transnational Law* 1043, 1076.
[8] Ibid.
[9] Tamir Moustafa, 'The Islamist Trend in Egyptian Law' (2010) 3 *Politics and Religion* 610, 611.
[10] Badran, 'Competing Agenda', above n 5, 202.

It could be argued that women's legal status remained subject to Islamic family law and without full legal equality because of the failure on the part of the Egyptian government to encourage religious institutions to consider more progressive reforms in favour of gender equality. Another factor was the failure of the Egyptian government to allow human rights and feminist organizations to practice freedom of speech, freedom of religion and freedom of assembly and association. Additionally, it could be argued that women's legal status continued to be subject to Islamic family law because Egyptian feminists focused on secular methods, meaning that some of the important religious elements of the cultural background were not addressed. Although the earlier discussions of some religious intellectuals who deployed religious tools to advocate the enhancement of women's status in Egyptian society prepared the way for the emergence of Egyptian feminism, the Egyptian feminist movement did not continue the project undertaken by these religious intellectuals, as I will show later.

In the following subsections of this part of the thesis, I will discuss some arguments of Rifa'a al-Tahtawi, Mohammed Abduh and Qasim Amin through the lens of the background-vernacularist approach. Before doing so, I would like to clarify why I have chosen these male religious intellectuals in particular. I would like to use Pierre Bourdieu's theory of the field of cultural production to illustrate my reasons. My purpose is not to provide a comprehensive analysis of Bourdieu's theory in this chapter. Nor I am interested in using Bourdieu's concept of the field to analyse Egyptian historical intellectual or feminist movement activism because it is beyond the scope of this chapter to do so. I am only interested in Bourdieu's theory because it provides us a better understanding of the symbolic position occupied by these religious intellectuals. In addition, it enables us to understand the symbolic credit given by the Egyptian state to the advancement of women's status.

In his concept of the field, Bourdieu made an analogy between the relations between fields and economic vocabularies.[11] He analysed culture using commercial vocabularies.[12] For example, writers who are well-known have 'specific capital'

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[11] Ian Maclean, 'Bourdieu's Field of Cultural Production' (1993) 4(12) *French Cultural Studies* 283, 286–7; Pierre Bourdieu, *The Field of Cultural Production: Essays on Art and Literature* (Polity Press, 1993).

[12] Nicole Kelley notes: 'Bourdieu's ideas about symbolic and cultural capital are an expansion and reworking of Karl Marx's vocabulary of economic capital.' Nicole Kelley, *Knowledge and Religious*

because of the recognition of their peers and competitors.[13] Hence, they, the writers, invest this recognition to get 'maximum profit from it'.[14] In order to do so, those writers rely on accumulation strategies and 'cultural bankers', who are the art dealers and publishers as 'producers' of symbolic goods (or capital cultural) to be enjoyed by 'consumers' who are the readers.[15] For Bourdieu, this explains how culture is produced. Cultural production is related to economic and class interests. It is located between 'the field of power whose values it inverts and the habitus of those who contribute to it as artists and writers'.[16]

For Bourdieu, the field 'consists of a set of objective, historical relations between positions anchored in certain forms of power (or capital)'.[17] Joseph Ibrahim points out that 'Bourdieu's use of the word "field" is obviously a metaphor for a space, or arena in which a game-like scenario is played out'.[18] For Bourdieu, there are many fields such as the literary field, educational field, religious field and political field. Each field has its own symbolic goods and main players or agents.[19] Each field's agents 'know how' 'to play the game competently, and certain rules have to be followed in the game'.[20] Nevertheless, some players in a particular field 'have a better understanding of the rules than others'.[21] However, for Bourdieu, the state or the official authority usually acts 'as an agent of the central bank of symbolic credit'.[22] This is because it dominates all fields at least through its symbolic power.[23]

My reasons for choosing al-Tahtawi, Abduh and Amin's arguments in particular can be understood in this context. First, they have cultural capital in Pierre Bourdieu's sense. If we understand cultural capital as recognition from peers and competitors,

Authority in the Pseudo-Clementines: Situating the Recognition in Fourth-Century Syria (Mohr Siebeck, 2006) 31.

[13] Alejandro Mejías-López, The Inverted Conquest*: The Myth of Modernity and the Transatlantic Onset of Modernism (Vanderbilt University Press, 2010) 51.

[14] Maclean, 'Bourdieu's Field of Cultural Production', above n 11, 285.

[15] Ibid.

[16] Ian Maclean, *Scholarship, Commerce, Religion* (Harvard University Press, 2012) 241.

[17] Pierre Bourdieu and Loïc J D Wacquant, *An Invitation to Reflexive Sociology* (University of Chicago Press, 1992) 16.

[18] Joseph Ibrahim, *Bourdieu and Social Movements: Ideological Struggles in the British Anti-Capitalist Movement* (Springer, 2015) 48.

[19] Ibid.

[20] Ibid 49.

[21] Ibid.

[22] Bourdieu, *The State Nobility*, above n 1.

[23] David Swartz, *Symbolic Power, Politics, and Intellectuals: The Political Sociology of Pierre Bourdieu* (University of Chicago Press, 2013) 148.

they have been recognized first, by al-Azhar University, which was one of the main 'cultural bankers' at that time. al-Azhar was the primary and most prestigious higher educational institution at that time, and pre-eminent in the production of cultural goods. This means that many students who graduated from the institution become government employees and occupied high positions in the government, especially as judges and Mufti, as I will discuss later. Relatedly, these intellectuals were government employees, and therefore in a sense employees in the 'central bank of symbolic credit', which is the government.

A second reason for choosing these three male religious intellectuals is that they all studied and lived abroad. All of them travelled to Europe, especially France, and they were influenced by what they studied and experienced during their stay in Europe. This enabled them to discuss women's rights through a hybrid discourse, enabling them to produce a discourse that challenged itself and at same time vernacularized new concepts. Drawing upon Bourdieu's concept of the field, these religious intellectuals were cultural agents who possessed cultural capital in the religious field and knew how to play the 'language game', as I will discuss later.

A. Rifa'a al-Tahtawi's hybrid position as a vernacularizer

I turn now to the first religious intellectual who argued for women's right to education: Rifa'a al-Tahtawi. The main purpose of considering al-Tahtawi is to show his position as a vernacularizer. He worked as a translator of Western science and thought to mediate between conflicting discourses, the discourse of modernization and traditionalist religious discourse. I attempt to show how al-Tahtawi occupied a hybrid position that allowed him to be a mediator between two different cultures. Understanding al-Tahtawi's work in a general sense is important in understanding how subsequent religious intellectuals deployed religious tools and cultural discourse to change the cultural background and/or to vernacularize women's rights. They include Qasim Amin, who will be discussed later in this chapter, and al-Tahir al-Haddad, who will be discussed in Chapter 5. In addition, it provides an argument for

the usefulness of Islamic feminists' work on religious texts in order to promote women's human rights in Muslim societies, as discussed in Chapter 2.[24]

As mentioned previously, Muhammed Ali, who ruled Egypt from 1805 to 1848, made efforts to promote the modernization of the country 'and its opening up to Europe, through a vigorous programme of industrialisation and education'.[25] The main goal of Muhammed Ali's modernization project was to legitimize Western intellectual products. John Livingston writes:

> At the cultural heart of the intellectual awakening, or *al-Nahda*, that arose with Egypt's modernization movement in the 19th century was the endeavor to legitimize the innovations which came in the train of military, scientific, technical, and educational imports from the West. The vanguard of this movement … came from leading religious shaykhs in the government's employ. It may seem remarkable that graduates and teachers of such a conservative religious institution as al-Azhar took lead as spokesmen for change, particularly when models of this change came from the Christian West, the traditional antagonist of Islamdom for more than a millennium.[26]

Attempts to vernacularize Western intellectual products into the local context of Egypt deployed religious tools. There were two reasons for this. First, at that time the religious establishments, such as al-Azhar, were the dominant educational institutions. There were no other institutions to compete with them. Working toward 'religious accommodations of Western-based reform, was the threat posed by the state' to religious institutions.[27] In other words, the state's attempts to encourage the religious discourse to support Western-based reforms in the government – such as the reforms made to the education system – was considered by religious institutions in Egypt as a threat to their power. It also threatened religious institutions' monopoly on education, which was unquestioned until new schools were founded by Muhammed Ali's government.[28] As Livingston points out, the new schools undermined the prestigious

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[24] The modernization of Egypt by Muhammed Ali enabled the emergence of Egyptian feminism. Nabila Ramdani notes:
> [T]he formation of a feminist consciousness in Egypt ran in parallel with the country's rapid development as a modern state at the start of the 19th century. Technological advancements within Muhammed 'Ali's increasingly capitalistic, secular country were accompanied by burgeoning intellectual thought among all sections of society, including women.

Nabila Ramdani, 'Women in the 1919 Egyptian Revolution: From Feminist Awakening to Nationalist Political Activism' (2013) 14(2) *Journal of International Women's Studies* 39, 39.
[25] Myriam Salama-Carr, 'Negotiating Conflict: Rifā'a Rāfi'Al-Tahtāwī and the Translation of the "Other" in Nineteenth-Century Egypt' (2007) 17(2) *Social Semiotics* 213, 215.
[26] John W Livingston, 'Western Science and Educational Reform in the Thought of Shaykh Rifa'a Al-Tahtawi' (1996) 28 *International Journal of Middle Eastern Studies* 543, 543.
[27] Ibid.
[28] Ibid.

position of religious institutions as the protectors of religion.[29] Second, and relatedly, the main Egyptian educated elites were graduates of al-Azhar, and were educated religious scholars. Muhammed Ali attempted to persuade al-Azhar to accept Western intellectual products by using other educated religious intellectuals to do this task. These religious intellectuals were vernacularizers in the sense explained by Sally Engle Merry. Therefore, as Livingston points out, in Egypt at that time, 'the reasoned voice advocating change came from the very custodians of conservative tradition'.[30]

To enable this task to be accomplished, Muhammed Ali sent missions of young male students to European countries, especially to France, so that they could 'learn languages and acquire knowledge of "foreign" sciences'.[31] One of these students who became influential in the modernization process upon his return from France was Rifa'a al-Tahtawi.[32] Al-Tahtawi was nominated by one of his teachers in al-Azhar to be a spiritual guide to and moral observer of the students in Paris, despite the fact that al-Tahtawi was younger than many of the students.[33] Instead of remaining only a

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[29] Livingston argues that the threat posed by Muhammad Ali's political agenda of modernizing education through separating it from the religious establishments was 'a threat more direct and insidious than French or British imperial designs'. This was because, as Livingston writes, during the French colonial era in Egypt, French colonials had enhanced the prestigious position of religious institutions and scholars in order to use them to gain religious legitimacy for their colonization of Egypt. Hence, religious institutions at the time of colonialism in Egypt were treated as ruling partners. On the basis of this, the modernizing state of Muhammed Ali 'and his successors was making irrelevant the religious institution that the French had pretended to make a ruling partner'. Ibid 544.

[30] Ibid. Livingston writes: 'As servants of the government, the shaykhs, many of whom had been sent abroad for specialized education, were in a position to perceive the weakness of their society as it was confronted by an expanding West.' Ibid 543. The fact that they had access to Western thought and could understand the weaknesses in their own society would have given them a huge incentive to think about change. In this sense, as Livingston argues, they wanted science to be taught in religious schools so that they would not become irrelevant. In other words, they wanted science to be taught so that the religious schools could maintain their prestige and compete with the new schools being created by Ali.

[31] Salama-Carr, 'Negotiating Conflict', above n 25, 215.

[32] Salama-Carr writes:

Louis Awad (1986, 31) suggests that al-TahTawi 'may be called the father of Egyptian democracy, the father of Egyptian nationalism and the father of Egyptian secularism or humanism', while Albert Hourani (1983, 54) refers to him as 'the first considerable political thinker of modern Egypt'. Anouar Louca, the author of the French translation of *al-takhlis*, sees al-TahTawi as the symbol of the Arab Renaissance (Louca 1988, 11).

Ibid 206. See also Louis Awad, *The Literature of Ideas in Egypt, Part I* (Scholars Press, 1986); Albert Hourani, *Arabic Thought in the Liberal Age, 1798–1939* (Oxford University Press, 1962); Mona Abaza, 'The Trafficking With Tanwir (Enlightenment)' (2010) 30 *Comparative Studies of South Asia, Africa and the Middle East* 12.

[33] Eugene Rogan writes: 'Al-Tahtawi left Egypt in April 1826 dressed in the robes and turban of a scholar of Cairo's ancient mosque university of al-Azhar. He was bound for France, appointed chaplain to Egypt's first major education mission to Europe. He would not see his native land for another five years.' Eugene Rogan, 'The Arab Wave' [2011] *The National Interest* 48, 48.

spiritual guide for the students in Paris, al-Tahtawi chose to study the French language, sciences and philosophy.[34]

Upon his return from Paris, al-Tahtawi published a book that told the story of his journey in Paris and observations on French education and social life.[35] As a translator, al-Tahtawi attempted to vernacularize Western science and thoughts into the local discourse of the Muslim community. Through his translations, al-Tahtawi become a mediator between two different cultures. As Myriam Salama-Carr notes, al-Tahtawi's mediating agency was 'at the heart of an encounter between seemingly competing and mutually exclusive ideologies'.[36] Al-Tahtawi devoted himself to legitimizing Western science so that it would be acceptable religiously and culturally. As Salama-Carr argues, the 'appropriation of foreign science could be legitimised by showing that a new context need not necessarily be an alien one, and by invoking the religious legitimacy of the quest for knowledge'. Hence, in order to gain acceptance of such foreign science 'the "Other" must be familiarised'.[37]

In this way, al-Tahtawi was working to integrate new ideas, or to vernacularize them, into Egyptian cultural discourse. As I have indicated in previous chapters, the main objective of the vernacularization of human rights norms is to make them familiar and understandable for the local society. I consider this a process of making familiar what had appeared strange. However, I do not suggest that al-Tahtawi embraced science wholeheartedly. This was because, as Livingston points out, al-Tahtawi was selective in his treatment of science and this explains his ambivalent position. Livingston writes:

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[34] Livingston points out that Al-Tahtawi 'formally studied astronomy, mathematics, geometry, physics, geography, and European history'. In addition, he studied 'Voltaire, Racine, Condillac, Condorcet, Rousseau, Montesquieu – whom he calls the Ibn Khaldun of the French, reversing the joke of his Orientalist tutors who referred to Ibn Khaldun as the Montesquieu of the Arabs.' During his stay in Paris, which was five years long, al-Tahtawi translated twelve books from French to Arabic. Livingston, above n 26, 548.

[35] Mohammed Sawaie points out that al-Tahtawi's book, *Takhlis al-ibriz fi talkhis Bariz* [*The Extraction of Gold in the Summarizing of Paris*], was first published by Bulaq Printing Press in 1834. 'Al-Tahtawi provided descriptions of daily Parisian life; aspects of French civilization, administrative, social, and political institutions; and various sciences that were unknown to him.' Mohammed Sawaie, 'Rifaʿa Rafiʿ al-Tahtawi and his Contribution to the Lexical Development of Modern Literary Arabic' (2000) 32 *International Journal of Middle East Studies* 395, 396. For the English translation of al-Tahtawi's *Talkhis* see Rifāʿah Rāfiʿ Ṭahṭāwīa *An Imam in Paris: Account of a Stay in France by an Egyptian Cleric (1826–1831)* (Daniel L Newman trans, Saqi, 2004) [trans of: *Takhlis al-ibriz fi talkhis Bariz* (1834)].

[36] Salama-Carr, 'Negotiating Conflict', above n 25, 219.

[37] Ibid.

Tahtawi's education in Paris was steeped in the Enlightenment, in which the technology of science promised social regeneration through physical, material, and spiritual well-being, and universal education of both sexes. For these ends, the beneficial fruits of science can be taken, but not their philosophical seeds. However, when Tahtawi came to speak of the social qualities borne by true scientific inquiry – freedom, liberty, progress, growth of the human spirit – the seeds were to become essential. This makes any absolute statement on Tahtawi's attitude towards science and its principles most difficult.[38]

My purpose, however, is not to resolve the ambiguity of al-Tahtawi's attitude toward science as it was raised by Livingston because my interpretation of al-Tahtawi's works is different from Livingston's. Livingston considered that al-Tahtawi's position toward Western science and ideas was ambivalent. In contrast, through the lens of the background-vernacularist approach, I consider al-Tahtawi as a cultural agent who knew how to play the game and knew the limitations of his argument within the religious field. In addition, my interpretation of al-Tahtawi is limited to his deployment of religious or cultural discourse in order to introduce Western science and ideas.

For example, al-Tahtawi deployed cultural tools – including religious discourse and cultural norms and principles – to give Western science and thought roots in Arab-Islamic history. Islamic traditionalists considered that the adoption of Western sciences by religious establishments was *bid'a* (innovation).[39] Therefore, it was not acceptable. In order to make Western science familiar in an Islamic context, al-Tahtawi invoked the history of Islamic civilization and argued that science is not a 'Western creation'.[40] 'Islam set a long and prestigious precedent in scientific study and discovery, preparing the way for the West.'[41] Thus, al-Tahtawi argued, adopting Western science was not imitating the West. Rather, it was 'returning what it had taken from Islam centuries earlier'.[42]

Furthermore, al-Tahtawi attempted to change the social meanings of concepts brought from the West. For example, 'freedom' in Arabic, *Hurriyya*, was simply the opposite of enslavement. For Daniel Newman, al-Tahtawi was the first Arab intellectual who

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[38] Livingston, above n 26, 547.
[39] Ibid 553.
[40] Ibid. As Salama-Carr argues, al-Tahtawi focused on the so-called Golden Age of Islam, which is known in Islamist narrative as Zaman al-Khualfa (the era of the caliphates). He focused on this era to legitimize the adoption of Western science because that era witnessed an interest in science and the promotion of translation. Salama-Carr, 'Negotiating Conflict', above n 26, 219.
[41] Ibid.
[42] Ibid.

used 'freedom' in the European sense to refer to personal freedom.[43] Al-Tahtawi argued that the concept of freedom is another ideal that the French share with the Arabs: 'Their [the French and the Arabs'] affinity manifests itself most strongly in things like honour, freedom and pride'.[44] In order to vernacularize the concept of freedom, al-Tahtawi explained that this concept refers to justice and equity. Hence, al-Tahtawi argues, these two concepts, which are the main elements of freedom, are the cornerstones of Islamic political theory.[45]

In this sense, al-Tahtawi's position as a translator was as 'a hybrid, occupying an "in-between" space'.[46] As a hybrid, al-Tahtawi took the position of vernacularizer in Engle Merry's sense. al-Tahtawi was, to use Salama-Carr's paraphrase of Pierre Bourdieu's reference to intellectuals, 'an observer and a social agent'.[47] Al-Tahtawi attempted to familiarize and legitimize the 'other' through 'the identification of parallels, common values and experience'.[48] In this way, as Salama-Carr points out, al-Tahtawi 'negotiated between conflicting discourses of modernism and traditionalism'.[49]

In his argument for women's right to education, al-Tahtawi deployed similar methods. He investigated Islamic history to prove that Islamic teachings do not conflict with the right of women to education.[50] As an example al-Tahtawi pointed out that Prophet Muhammed had asked one woman, who was educated in writing and reading, to teach

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[43] Al-Tahtawi, *An Imam in Paris*, above n 35, 195–6, quoted in Salama-Carr, ibid 221.

[44] Al-Tahtawi, ibid 361, quoted in Salama-Carr, ibid 221.

[45] Al-Tahtawi, ibid 206, quoted in Salama-Carr, ibid 221.

[46] Salama-Carr, ibid 223; Myriam Salama-Carr (ed), *Translating and Interpreting Conflict* (Rodopi, 2007); Maria Tymoczko, 'Ideology and the Position of the Translator: In What Sense is a Translator 'In-Between'? in Maria Calzada-Perez (ed), *Apropos of Ideology: Translation Studies on Ideology – Ideologies in Translation Studies* (Routledge, 2014) 181.

[47] Salama-Carr, 'Negotiating Conflict', above n 25, 223.

[48] Ibid. J Heyworth-Dunne points out that, when al-Tahtawi was writing his book describing his admiration of French-developed civilization, he was aware of the fact that his book would be read by his religious colleagues. Therefore, this 'compels Rifa'ah to refer to the Kor'an and *Hadith* in appropriate passages, as he knows that all his exhortations to the *sheikh* [religious scholars] class regarding European learning will go unheeded'. J Heyworth-Dunne, 'Rifā‹Ah Badawī Rāfi‹ Aṭ-Ṭahṭāwī: The Egyptian Revivalist' (1940) 10(2) *Bulletin of the School of Oriental and African Studies* 399, 402.

[49] Ibid 213.

[50] Rifa'ah al-Tahtawi, *al-Murshid al-Amin lil al-Banat wal-Banin* [*Trusty Guide for the Education of Girls and Boys*] (Dar al-Kitab al Massri, 2012). According to Mona Abu Zaid, who wrote the introduction to this Arabic edition of al-Tahtawi's book (at 44), this book is considered the first Arabic book to discuss women's right to education. Al-Tahtawi wrote this book because the governor of Egypt, al-Khaidiwi Ismael, asked him to do so when Ismael made women's right to education one of his political priorities. This book was therefore based on the political will of the governor of Egypt because the education of girls at that time faced resistance from many people in Egypt.

one of his wives, Hafsa.[51] As the *Arab Human Development Report 2005* points out, when al-Tahtawi was defending women's right to education 'he resorted to history and to some aspects of Islamic law, attempting to reconcile history and tradition with modern gains in knowledge and social life'.[52] In addition, al-Tahtawi attempted to challenge the cultural view that education was a threat to women's chastity and modesty. As the *Arab Human Development Report 2005* points out, Al-Tahtawi 'set out to establish justifications for co-education, provided that it did not offend modesty'.[53] In doing so, al-Tahtawi argued that women's chastity and modesty are not related to the veil or exclusion from public life; rather, women's chastity and modesty are related to the good upbringing and education of girls.[54] Therefore, al-Tahtawi 'insisted on the need to educate women and liberate them from the numerous injustices to which they were exposed'.[55] As the *Arab Human Development Report 2005* points out, in his discussion of the importance of women's education, al-Tahtawi indicated a number of issues that prevented the improvement of women's condition, such as not allowing women to be taught writing and reading. Al-Tahtawi also 'challenged misogynist views that portray women as the embodiment of cunning or as creatures of inferior intellect, views that consider that a woman's role is, to quote Al-Tahtawi, no more than that of "a container that preserves offspring"'.[56] Al-Tahtawi suggested that 'women can undertake the same kinds of jobs and work undertaken by men … This work can preserve women from doing what is inappropriate and if unemployment is a shame for men, it is a great shame for women.'[57]

As this section has shown, al-Tahtawi's position as a translator, an employee in the government, and a member of a religious institution enabled him to write in a way that made his arguments understandable. Drawing upon Bourdieu's concept of the

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[51] Ibid 146.

[52] United Nations Development Programme, Regional Bureau for Arab States, Arab Fund for Economic and Social Development, *The Arab Human Development Report 2005: Towards the Rise of Women in the Arab World* (Stanford University Press, 2006) 150. I would like to note that I focus on this report because it contains information about the number of women's associations in Egypt from the nineteenth century onwards and the work of various women.

[53] Ibid.

[54] Ibid.

[55] Nawal El Saadawi, *The Hidden Face of Eve: Women in the Arab World* (Zed Books, 2nd ed, 2007) 253.

[56] *The Arab Human Development Report 2005*, above n 52, 150.

[57] al-Tahtawi, *al-Murshid al-Amin*, above n 50, 213; see also *The Arab Human Development Report 2005*, above n 52, 150.

field, I would argue that al-Tahtawi was a social agent in both the religious and political fields. As a social agent in the religious field, al-Tahtawi was aware of how to produce his hybrid discourse in order to vernacularize Western ideas. This section can be concluded as follows. Regardless of his reservations about science and some Western ideas, al-Tahtawi can be considered an example of a vernacularizer.

In the next section, I will briefly discuss Mohammed Abduh, who made efforts to change the background through the deployment of *ijtihad*. My argument about Abduh will be limited to his discussion of polygamy. My purpose is only to show how he challenged one aspect of the cultural background of the inferior status of women.

B.   *Challenging the cultural background through ijtihad*

In Chapter 2, I discussed the notion of *ijtihad* as one of the religious tools that can help with challenging the cultural or religious background that constitute the inferior status of women in religious discourse generally. As discussed in Chapter 2, Islamic feminists and their transnational advocacy networks argued that there is a difference between the spirit of Islam which asserts the values of equality, equity, kindness and compassion and Islamic jurisprudence which is open to change, because it is literally 'man'-made. Therefore, they assert that women's human rights can be promoted by challenging the previous religious norms of jurisprudence by deploying *ijtihad*.

It might be useful to give an example of how the use of *ijtihad* was crucial in the history of Egyptian feminism.[58] The main crucial historical turning point in Egyptian history was the attempt of the religious scholar, Muhammed Abduh (1849–1905), to open the door of *ijtihad* as the main step in his reform of Islamic Sharia.[59]

Abduh was not a feminist and he was not an advocate for women's rights. But he was a religious scholar who advocated the modernization of Muslim society within the framework of Islamic Sharia. He suggested that one can be Muslim and modern at the

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[58] The *The Arab Human Development Report 2005* points out that the independent 'reasoning (ijtihad) of enlightened jurists and scholars, who are sensitive to the laws of change and development in society, stands behind several endeavours today to crystallise a noble view of the Qur'an's perception of different social phenomena and historical change.' , *The Arab Human Development Report 2005* above n 52, 146.

[59] Badran, 'Competing Agenda', above n 5. Abduh asked for the door of *ijtihad* to be opened. As I mentioned in Chapter 2, traditional scholars thought that *ijtihad* was fixed in the fourteenth century, and could not be changed. However, Abduh asked for the door to be opened so that change could be discussed.

same time. His vision of modernization was influenced by his exile in Europe.[60] When he came back from Europe, Abduh attempted to vernacularize the human rights culture of the Western countries in a very simple and effective sentence. Abduh said in his famous dictum: I went to the West and saw Islam, but no Muslims; I got back to the East and saw Muslims, but not Islam.[61] His argument and discourse about women's rights at that time had more impact than many writers who had written about women's issues because he was a distinguished religious scholar in al-Azhar, the most prestigious religious institution in the Arab world, if not in the Islamic world, and because he was the head of the Islamic Verdict body (Mufti).[62] Abduh had cultural capital, in the sense explained by Bourdieu, in the religious field.

Abduh advocated for Muslim states to resist colonialism and to adopt modern principles.[63] He was the first Muslim religious scholar who re-interpreted the Quranic text on polygamy, which allows men to marry four women. Abduh came to the conclusion through his *ijtihad* that the Quran in fact forbids polygamy because the Quran requires equal treatment of wives by their husband. He argued that this condition cannot be achieved by human beings, because it is difficult to 'take care of

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[60] For more explanation of Abduh's exile and life in France and Britain see Mark Sedgwick, *Muhammad Abduh* (Oneworld Publications, 2014).

[61] Zareena Grewal, *Islam is a Foreign Country: American Muslims and the Global Crisis of Authority* (NYU Press, 2013) 152. Abduh meant that he found that European people practise the good things that Islam asks Muslim people to do such as justice, equality, equity, compassion, kindness, tolerance, altruism and so on. So, for Abduh, although European people are not Muslim, they have been practising de facto Islam. When Abduh said 'I got back to the East and saw Muslims, but not Islam', he meant that Muslim people have been Muslims on paper and through the practice of religious rituals, but they have not been Muslims substantively. One of his good impressions about European people, for example, was their charitable institutions. Charles Adams wrote:

> Muhammad 'Abduh had been impressed, during his travels in European countries, by the extent to which charitable institutions had been developed in those lands and the importance attached to public co-operation in practical benevolences. Here, he came to believe, was one of the directions in which Muslim peoples might commendably follow the lead of Christian nations. While the religion of Islam enjoins private giving of alms and inculcates concern for the poor, organized and corporate effort on behalf of the needy and unfortunate has never flourished to any great extent in Muslim countries, even to the present day.

Charles C Adams, *Islam and Modernism: A Study of the Modern Reform Movement Inaugurated by Muhammad 'Abduh* (Islamic Book Trust, 1933) 84.

[62] Ibid 79.; see also, Sheikh Muhammad Abduh, *Islam is Pro-monogamy: Sheikh Muhammad Abduh* (2011) <http://muhammadabduh.net/?page_id=27>. In this sense, Abduh's argument was considered a verdict (*fatwa*). In this *fatwa*, Abduh restricted polygamy. See also Sisters in Islam, *Misunderstanding the Prophet's Sunnah on Polygamy* (2010) <http://www.sistersinislam.org.my/news.php?item.293.7>.

[63] Richard Gottheil points out that during his stay in Europe Abduh studied the development of modern European thought. As Gottheil points out, Abduh read Moliere, Victor Hugo, Schiller, Goethe, Kant and Schopenhauer. Richard Gottheil, 'Mohammed 'Abdu, Late Mufti of Egypt' (1907) 28 *Journal of the American Oriental Society* 189, 196.

all of them and give to each her rights with impartiality and justice'.[64] Therefore, the Quran prohibits polygamy.[65]

Abduh inspired writers who came after him because he opened the door of *ijtihad* and gave legitimacy to the deployment of religious and cultural arguments to promote change. Unlike al-Tahtawi, whom I discussed above, Abduh deployed *ijtihad* in his attempt to change the rules about polygamy. Although al-Tahtawi's argument was more about the vernacularization of Western science and thought to make them familiar to both religious and ordinary people, Abduh's work on limiting polygamy was more influential because it showed how women's human rights can be promoted by the deployment of *ijtihad*. It should be noted that Abduh's challenge to the cultural background of polygamy did not lead to the abolition of polygamy in Egypt. In addition, Abduh's discussion was not accepted by many religious intellectuals or even ordinary people. However, through the lens of the background-vernacularist approach, we can consider Abduh's argument as an alternative story of the truth of polygamy. He enabled arguments against polygamy to take place using religious discourse. It can be argued that the abolition of polygamy in Tunisia might have been influenced by Abduh's discussion, as I will show in Chapter 5.

The following section discusses the work of Qasim Amin within the framework of the background-vernacularist approach. I do not want to discuss Amin's works in depth. My purpose is limited to showing how we can understand Amin's argument for the advancement of women's status in Egypt. I want to show how one intellectual deployed cultural tools, one of which was religious discourse, to argue for women's right to education and freedom of movement.

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[64] Asghar Ali Engineer, *The Rights of Women in Islam* (C Hurst & Co, 1992) 157.
[65] Ruth Roded (ed), *Women in Islam and the Middle East: A Reader* (Tauris & Co, 2nd ed, 2008) 1, 10. Nawal El Saadawi argues that the Quran's position on polygamy is ambiguous. For this reason, religious scholars have been divided between two point of views. Some argue that polygamy is legitimate and some argue it is illegitimate. The Quran states under Surat [verse 3] El-Nissa [the Women]: 'Marry as many women as you wish, two or three or four. If you fear not to treat them equally, marry only one. Indeed you will not be able to be just between your wives even if you try'. El Saadawi writes:

> [One group of religious thinkers including Abduh] insists that the Qur'an has forbidden polygamy, since a man is not permitted to marry more than one woman unless he can treat his wives equally and not differentiate in the slightest degree between them. And the Qur'an goes on to say that this is impossible no matter how hard a man tries.

Nawal El Saadawi, 'Woman and Islam' (1982) 5(2) *Women's Studies International Forum* 193, 198.

C.   *Interpreting Qasim Amin's argument through the lens of the background-vernacularist approach*

Qasim Amin's (1863–1908) argument in his book *The Liberation of Women* (first published in 1889) can be considered the first attempt in Egypt both to challenge the background knowledge about women's role in society *and* to place the principles of liberalism in the context of Egyptian, if not Islamic, culture.[66] In 1881, Amin obtained a bachelor's degree in law from the School of Law and Administration and was sent to France for five years to study law. During his stay in France, Amin joined Jamal al-Din al-Afghani and Muhammad Abduh to participate in the publication of the journal *al-Urawat al-wuthga* (*The Solid Bond*). 'After his return to Egypt, he joined the judicial system and worked as attorney general and judge.'[67]

In *The Liberation of Women* Amin discussed women's status in Egyptian society.[68] He called for the improvement of women's status in Egypt using two arguments. First, Amin emphasized that the low status of women in Egyptian society was due to the condition and circumstances in which Egyptian women were placed. He believed that men and women are equal. There is no difference between their rationality and the strength of their bodies.[69] The main difference between them was that, while men were allowed to be educated and to practise what they learned in public life, women

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[66] Amin was not the first intellectual who discussed women's human rights. As I indicated previously, al-Tahatawi had argued for women's rights to education before Amin. In addition, there were female intellectuals who argued for women's human rights through the deployment of religious discourse such as Maryam al-Nahhas (1856-1888) and Zaynab Fawwaz (1880-1914) as I will indicate later in this chapter. This, however, does not contradict my statement that Amin's book can be considered the first attempt to deploy cultural discourse to argue for women's rights. That was because Amin's book was more radical than al-Tahtawi's arguments and because he had more cultural capital at that time compared to female intellectuals such as al-Nahhas and Fawwaz. The existence of this cultural capital attracted more critique to his books, as I will mention later. In this sense, Amin's book was devoted to the promotion of women's status not only in education, but in society as well. Afsaneh Najmabadi writes:

> Amin, known for advocating 'women's liberation' through education, the removal of the veil, and an end to seclusion, emphasized the importance of civilizing women in order to enable them to provide the proper 'physical, intellectual, and moral upbringing' for their children, and hence to ensure the progress of the nation.

Afsaneh Najmabadi, 'Crafting an Educated Housewife in Iran' in Lila Abu-Lughod (ed), *Remaking Women: Feminism and Modernity in the Middle East* (Princeton University Press, 1998) 89, 131.

[67] Charles Kurzman, *Modernist Islam, 1840–1940: A Sourcebook* (Oxford University Press, 2002) 61.

[68] Qasim Amin, *The Liberation of Women: And, The New Woman: Two Documents in the History of Egyptian Feminism* (American University in Cairo Press, 2000).

[69] Amin wrote: '[W]ho do you understand a woman to be? Like a man, she too is a human being. Her body and its functions, her feelings, and her ability to think are the same as a man's. She has all the essential human traits, differing only in gender.' Ibid 11.

were not allowed to do so.[70] According to Amin, Egyptian women were imprisoned by their ignorance because they were excluded from education and participation in public life.[71]

On the basis of this, Amin emphasized the importance of the education of women.[72] However, Amin argued that the education of women would not be effective if women were prevented from participating in public life in order to practise what they had learnt. Amin argued that if a woman cannot work and practise what she has learnt, her education is no more than an imagination that could be forgotten easily. Amin challenged the notion of *hijab*, which is the veiling of the face and whole body and the exclusion of women from the public sphere. Amin pointed out that if a forty-year-old man were kept between four walls and prevented from participating in public life, he could lose his rationality. This means women are not irrational because of their nature, only because of their lack of education and experience in public life.

I would argue that the parallels between Amin's argument and Mary Wollstonecraft's *A Vindication of the Rights of Women*, John Stuart Mill's *The Subjection of Women*, and Harriet Taylor Mill's *Enfranchisement of Women* are significant.[73] Like

[70] Amin wrote: '[T]he superior physical and intellectual strength of man can be best explained by considering the past, when for many generations men have been involved in the world of work and in the pursuit of intellectual activities. During those years, women have been deprived of all opportunity and forced into inferior position.' Ibid.

[71] Therefore, as Margot Badran and Miriam Cooke argue, because pro-feminist men had contact with European society 'in which women were generally visible', they argued that 'Arab society was backward because women were backward, and women were backward because of lack of education and because of social constraints, such as veiling and seclusion practised in the middle and upper classes.' Margot Badran and Miriam Cooke, *Opening the Gates: A Century of Arab Feminist Writing* (Indiana University Press, 1990) xvi.

[72] This does not mean that no Egyptian women were educated or that Egypt had not started to provide elementary schooling for girls. Amin's argument is directed to the whole of Egyptian society because at that time many families resisted the idea of girls' education. This resistance can be seen in this story told by Amin:

> I recall a discussion I had with the father of an attractive and intelligent nine-year-old girl. I was trying to communicate to him the importance of giving his daughter an education. In response to my suggestion he said, 'Do you then expect her to have a position in the civil service?' I objected to his response and asked 'Do you believe that we should educate only those who will be employed?' He replied, 'I am teaching her all that is necessary for running her household, and I will do nothing else besides that.'

Amin found the father of the nine-year-old girl was stubborn and acting in error because, although skills such as cooking, sewing and ironing are important for any woman, 'a woman cannot run her household well unless she attains a certain amount of intellectual and cultural knowledge'. Therefore, Amin suggested that a woman should learn at least 'what a man is required to learn up through the primary stage of education'. Amin, above n 68.

[73] This is my re-interpretation of Amin's argument. I make a comparison between his argument and these Western intellectuals and philosophers. However, it has been argued that, as I will show later in

Wollstonecraft, Mill and Taylor Mill, Amin defended the rationality of women and the importance of their participation in public life.[74] Like Wollstonecraft, Mill and Taylor Mill, Amin emphasized the circumstances of women in society as the main reason for the low status of women. Furthermore, in the same vein as Wollstonecraft, Mill and Taylor Mill, Amin argued that educating women would produce capable mothers who could better manage their families.[75]

In the second point of Amin's argument he attempted to deploy cultural tools, one of which was religious justifications, in order to promote cultural change. This can be seen in the following argument. Amin wrote:

> Some people will say that today I am publishing heresy. To these people I will respond: yes, I have come up with a heresy, but the heresy is not against Islam. It is against our tradition and social dealings, where the demand for perfection is extolled. Why should a Muslim believe that his traditions cannot be changed or replaced by new ones, and that it is his duty to preserve them forever? Why does he drag this belief along to his work, even though he and his traditions are a part of the universe, falling all times under the laws of change? Can the Muslim contradict God's laws of creation – God who has made change a prerequisite for life and progress, rather than immobility and inflexibility, which are characteristics of death and backwardness?[76]

Amin argued that Islam has promoted women's status, but the practices of Muslim men have ignored this and deprived women of their rights. Thus, Amin argues that 'men have not wished to consider women other than as beings fit only to serve men and be led by men's will!'[77] Amin attempted to challenge the cultural background that imposed the veil on women and legitimized their seclusion from the public sphere in order to maintain the morality of society. It should be noted that Amin's argument seems patriarchal and conservative, as I will address later. However, if we re-interpret Amin's argument through the background-vernacularist approach, we can understand

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this chapter, Amin's argument was influenced by colonial discourse that brought feminism abroad to insult the Other's or colonized people's culture.

[74] For example, Harriet Taylor Mill argued that women only became wives and mothers because they had few other opportunities available. Their feelings and intellectual activities were denied because they were denied education. Taylor Mill pointed out that, if maternity disqualified women from entering the public sphere, it is 'in fact to say, that every other career should be forbidden them in order that maternity may be their only resource'. Harriet Taylor Mill, 'Enfranchisement of Women' in John Stuart Mill and Harriet Hardy Taylor Mill, *Essays on Sex Equality* (Alice S Rossi ed, University of Chicago Press, 1970) (originally published in *Westminster Review*, July 1851).

[75] For example, Mary Wollstonecraft argued that when a woman strengthened her body and mind she would be able to manage her family and become a friend to her husband rather than the humble dependent of her husband. Mary Wollstonecraft, *A Vindication of the Rights of Women: With Structures on Political and Moral Subjects* (Gregg International Publishers, 2nd ed, 1972) 56.

[76] Amin, above n 68, 4–5.

[77] Ibid 15.

that Amin was attempting to challenge the cultural background by deploying the same cultural tools and discourse that constructed the truth of veiling and seclusion of women from the public sphere. As I discussed in Chapter 2, Susan Hekman suggested that 'feminists must construct arguments that are both convincing in the terms of the hegemonic discourse and at the same time transform that discourse'.[78] This can be shown in Amin's argument as follows.

The main idea behind veiling and women's seclusion from the public sphere is to maintain the morality of society lest its individuals commit adultery, which is any sexual activity outside marriage. To challenge this ingrained notion of the cultural background, Amin made two points, which were based on his deployment of religious tools and discourse. First, Amin argued that veiling and seclusion from the public sphere only applied to the Prophet's wives because of their special status. To support this point, Amin referred to verses 32 and 53 of chapter 33 of the Quran. Verse 32 stated:

> O wives of the Prophet! You are not like any other women. If you keep your duty (to Allah), then be not soft in speech, lest he in whose heart is a disease (of hypocrisy, or evil desire for adultery, etc.) should be moved with desire, but speak in an honourable manner.[79]

Furthermore, verse 53 of chapter 33 of the Quran stated:

> Believers, do not enter the houses of the Prophet for a meal without permission. if [sic] you are invited, you may enter, but be punctual (so that you will not be waiting while the meal is being prepared). When you have finished eating, leave his home. Do not sit around chatting among yourselves. This will annoy the Prophet but he will feel embarrassed to tell you. God does not feel embarrassed to tell you the truth. *When you want to ask something from the wives of the Prophet, ask them from behind the curtain. This would more proper for you and for them. You are not supposed to trouble the prophet or to ever marry his wives after his death, for this would be a grave offense in the sight of God.*[80]

In re-interpreting these verses, Amin notes: 'all the writings on Islamic jurisprudence agree, whatever the school or the interpretive books, that these passages refer exclusively to the women of the Prophet'.[81] This means that, as Amin argued, these

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[78] Susan J Hekman, *The Future of Differences: Truth and Method in Feminist Theory* (Polity Press, 1999) 89.

[79] I have quoted a recent translation of this verse. It does not contradict the translation given in Amin's book Compare the translation of this verse in *The Quranic Arabic Corpus – Translation* (2011) <http://corpus.quran.com/translation.jsp?chapter=33&verse=32>. Also compare this with Amin, above n 68, 43.

[80] Amin, ibid (emphasis added).

[81] Ibid 44.

'revelations pertained exclusively to the Prophet's women and are not applicable to women in general. Thus this seclusion is not a religious duty required for any other Muslim women.'[82]

Secondly, Amin argued that unveiling is necessary to maintain the morality of society. According to Amin, the veiling of women facilitates adultery because women's identity would not be revealed if they access the public sphere.[83] In addition, the seclusion of women from the public sphere leaves women with a lack of experience with men. Thus women could be easy targets of immorality.[84] Hence, Amin called for unveiling and an end to women's seclusion from the public sphere.

Using the lens of the background-vernacularist approach, I would argue that Amin deployed patriarchal and religious discourse, which was an authoritative discourse in that context, to challenge the cultural background that constructed veiling and women's seclusion from the public sphere. In this sense, Amin provided an alternative story of the cultural background and he argued for it. The result of his argument was that he made strange what had appeared familiar. So, veiling become exclusively for the Prophet's wives, which means it is not applicable to other women. In addition, veiling and seclusion of women from the public sphere may facilitate adultery and the corruption of society. I will recount a similar argument in Chapter 5 when I discuss the Tunisian intellectual al-Tahir al-Haddad.

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[82] Ibid.

[83] Amin writes:

> The gauze face-cover and the veil, which hide a woman's identity, allow her to reveal what she wishes to reveal and to act in a manner that incites desire. She need not be concerned that anyone might identify her and report that so-and-so, or the wife of so-and-so, was doing such-and-such. She can accomplish whatever she desires under the protection of her veil. If her face were uncovered, her family status or her own honor would retain her from initiating any provocative behaviour that might attract attention to herself.

Ibid 43.

[84] Amin writes:

> The assumption that seclusion is a prerequisite for preserving women's purity and for preventing immorality is unproven. No one has documented or compared the precise number of cases of adultery in countries where women are secluded and in countries where they are not. Even if the necessary statistics were available, they would neither prove nor disapprove anything, because the decrease or increase of immorality in a country is due not to seclusion alone, but to many interrelated factors … Experience demonstrates that liberation of women rather than their seclusion is better guarantor of women's purity. In considering freedom as a variable, we find that American women enjoy more freedom than any women on earth … Those familiar with American society believe that, in spite of this open interaction, American women, more than any others, guard their honor and have high moral standards. In fact, this high morality is attributed to the constant interaction between men and women in all walks of life. Another undeniable phenomenon is seen among Bedouin and rural women in Egypt, who, in spite of their open interaction with men … are less apt to deviate from moral standards than those women who live in urban areas and for whom seclusion is a way of life.

Ibid 51.

Amin attempted to provide an alternative story of the cultural background of veiling and women's seclusion to replace the old story. This alternative story told by Amin neither revealed the absolute truth of unveiling and women's access to the public sphere nor was it a false story. Instead it enabled him to argue for unveiling and the end of women's seclusion from the public sphere.

It should be noted, however, that there has been an interesting interpretation of Amin's book through the lens of postcolonial theory.[85] For Leila Ahmed, Amin's book did not provide any new arguments regarding women's right to education. This was because Amin's book was published in 1899, thirty years after 'a government commission had recommended providing government schools for both boys and girls'.[86] In addition, Ahmed argues that Amin's argument for women's education is in line with a conservative position. Ahmed notes: 'Amin's notion that women should receive a primary-school education similarly represented the conservative rather than the liberal point of view among intellectuals and bureaucrats of his day.'[87]

Ahmed argues instead that the radical idea that was raised by Amin's book was not the advocacy of women's education. Rather, it was his call for 'an end to segregation and veiling'.[88] As Ahmed points out, such demands attracted the most widespread denouncements of Amin's book.[89] Using postcolonial theory, Ahmed argued that Amin's book was influenced by 'the colonial thesis of the inferiority of the native and Muslim and the superiority of the European'.[90] She noted that Amin's argument was based on the ideas of Lord Cromer and Christian missionaries on the status of Muslim women.[91] In this way, she claims that the book was influenced by colonial discourse that 'appropriated the language of feminism in the service of its assault on the

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[85] Leila Ahmed, Women and Gender in Islam and Historical Roots of a Modern Debate (Yale University Press, 1992).

[86] Ibid 159.

[87] Ibid.

[88] Ibid 160.

[89] Ibid. As Ahmed notes, 'more than thirty books and articles appeared in response' to Amin's book. Ibid 161.

[90] Ibid 162.

[91] Ibid 155. Lord Cromer is Sir Evelyn Baring, who was the first British Consul-General of Egypt from 1882 to 1907. See Robert L Tignor, Egypt: A Short History (Princeton University Press, 2010) 228; Don Peretz, The Middle East Today (Holt Rinehart and Winston, 1971) 216. For a discussion of the history of Christian missionaries in Egypt see Beth Baron, The Orphan Scandal: Christian Missionaries and the Rise of the Muslim Brotherhood (Stanford University Press, 2014).

religions and cultures of Other men, and in particular on Islam'.[92] In this sense, as Ahmed argues, colonials deployed feminist discourse in order to give them a moral justification for assaulting the Other's culture. The main argument of such discourse was that veiling was the main sign of both the inferiority of Islamic societies and the oppression of women.

In this way, Ahmed has revealed the double standards of colonials toward feminism. She points out that, while many official servants of the British Empire – such as Cromer – resisted and oppressed feminists in their homeland because their campaigns were directed against white men, they took feminism 'abroad and directed it against the culture of colonised peoples'.[93] Drawing upon these main points, Ahmed writes:

> The fundamental and contentious premise of Amin's work was its endorsement of the Western view of Islamic civilization, people, and customs as inferior, whereas the author's [Amin's] position on women was profoundly patriarchal and even somewhat misogynist. The book merely called for the substitution of Islamic-style male dominance by Western-style male dominance. Far from being the father of Arab feminism, then, Amin might more aptly be described as the son of Cromer and colonialization.[94]

Although Ahmed has provided an interesting and somewhat persuasive interpretation of Amin's argument, in my view she has neglected two points in her argument. First, while Ahmed focuses on the parallels between Amin's argument and colonial discourse, she ignores the main idea of Amin's discussion, which was that Islam should not be blamed for the inferiority of women. Second, Ahmed has neglected the fact that, unlike the colonial discourse, Amin's argument was in fact based on religious discourse. As Nergis Mazid notes: 'Ahmed omits any analysis of Amin's use of Islamic argument to support his demand for social reform. Instead, she dismisses it as mere mimicry of Cromer.'[95] For Mazid, 'Amin's suppositions become a representative of cultural hybridity'.[96] In this sense, Amin's discussion 'was a hybrid of two ideological systems rather than a mere reiteration of an oppositional binary'.[97]

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[92] Ahmed, above n 85, 152.
[93] Ibid 153.
[94] Ibid 162–3.
[95] Nergis Mazid, 'Western Mimicry or Cultural Hybridity: Deconstructing Qasim Amin's "Colonized Voice"' (2002) 19 (2) *American Journal of Islamic Social Sciences* 42, 54.
[96] Ibid 57.
[97] Ibid 62.

Indeed, many conservatives and religious scholars at that time received Amin's book with shock.[98] In explaining the importance of Amin's argument, Margot Badran writes:

> Amin's books have since been widely, if incorrectly, acclaimed as the founding feminist texts in Egypt. Unlike the earlier works by women and Fahmi's book,[99] they [Amin's books] provoked heated controversy. The outcry against Amin was intense because of his status as a male Muslim and respected judge who not only insisted that his views conformed with Islam, but also used secular arguments. The ideas of Fahmi, a Copt – as of women – could be more easily dismissed.[100]

Malek Abisaab and Rula Jurdi Abisaab point out that, although some books had been published before Amin's book that discussed women's rights by female writers,[101] such as Maryam al-Nahhas (1856–1888) and Zaynab Fawwaz (1880–1914), Amin's book 'become the rallying force and the symbol for the movement of women's liberation in the Arab world'.[102] On 23 October 1999, for example, the Egyptian government's Supreme Council of Culture held a conference to celebrate 100 years since the publication of Qasim Amin's *The Liberation of Women*.[103]

Abisaab and Jurdi Abisaab argue that there were several reasons for the fame of Amin's book. First, Amin tied the improvement of women's status to the nationalist project.[104] Amin's argument assumes that promoting women's rights to education and participation in public life will guarantee the strength of the nation. This assumption supposes that women's status and roles within the private and public spheres should be connected to the nationalist project in resisting colonialism and building the state.[105] Second, Amin's argument challenges and criticizes the notion of *harem*, where women are kept away from public life. Amin's arguments against *harem* came at the same time as the colonialists' attack on such a notion.[106] Third, Amin's argument was directed especially to the aristocratic class. Amin himself was an

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[98] For more discussion of the critiques of Amin by some contemporary conservatives and nationalists see Joseph T Zeidan, *Arab Women Novelists: The Formative Years and Beyond* (SUNY Press, 1995) 274.

[99] Murqus Fahmi is an Egyptian Coptic man who worked as a lawyer and published his book *al-Mar'ah fi al-Sharq* (The Woman in the East) in 1894.

[100] Margot Badran, *Feminists, Islam, and Nation: Gender and the Making of Modern Egypt* (Princeton University Press, 1995) 19.

[101] For a discussion of women writers before and after Amin see Badran and Cooke, above n 71.

[102] Malek Abisaab and Rula Jurdi Abisaab, 'A Century After Qasim Amin: Fictive Kinship and Historical Uses of '*Tahrir al-Mar'a*' (2000) 32 *aljadid* 8.

[103] Ibid.

[104] Ibid 8.

[105] Ibid.

[106] Ibid.

aristocrat because of his position as a judge and his family history.[107] Therefore, he criticized the situation of women inside the families of aristocrats. Fourth, and importantly, Amin's arguments had credibility because he was a judge who had the right to interpret theological texts. Amin's argument was criticized so frequently because he partially deployed what I have described as background-vernacularist methods, one of which is making strange what had appeared familiar in order to challenge the cultural background. As I have shown previously, Amin argued that veiling was required exclusively for the Prophet's wives, and is not applicable to other women. Amin made veiling and seclusion of women from the public sphere, which were familiar at that time, to appear strange by arguing that they may facilitate adultery and the corruption of society. In addition, it can be argued that Amin's hybrid position allowed his argument to be effective in vernacularising the notion of women's rights to education and access to the public sphere that he observed in France into the Egyptian cultural discourse.

To conclude this part, it can be argued that those who wrote about the rights of women to education and defended women's human rights in that period were encouraged by the state or at least were enabled to speak out because of historical circumstances. According to Badran, there were many historical circumstances that enabled the emergence of Egyptian feminism. Badran writes: 'While Islamic modernism, liberal nationalism, and the feminism of progressive men prevailed in the early modern state-building and colonial period, women's causes found a positive and supportive environment'.[108]

Hence, their discourse was a cornerstone of Egyptian feminism. They cited religious, traditional, economic and political reasons for their insistence on the human rights of women. In this sense, what is called Islamic feminism today can be considered a more progressive continuation of the project initiated by those writers.[109] In her explanation of the contribution of Islamic feminism to women's human rights, Ziba Mir-Hosseini writes:

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[107] Ibid.
[108] Badran, 'Competing Agenda', above n 5, 206.
[109] Chapter 3 discussed the relationship between the background-vernacularist approach and Islamic feminism in more detail.

> [T]he emerging feminist scholarship on Islam is helping to bridge the wide gap that exists between the conceptions of justice that inform and underpin the dominant interpretations of the *shari'a* on the one hand, and human rights legislation on the other. This scholarship is part of a new trend of reformist religious thought that is consolidating notions of Islam and modernity as compatible, not opposed.[110]

Having considered how cultural tools and discourse were deployed to argue for the advancement of women's status in the history of Egypt, the following part briefly highlights some of the main historical points of the Egyptian feminist movement. My argument in the next part does not provide a comprehensive analysis of the history of Egyptian feminism. In addition, my argument is limited to the Egyptian feminist movement up to the date of Egypt's ratification of CEDAW. I do not at this point intend to discuss women's advocacy or the feminist movement in Egypt beyond the 1980s. Chapter 6 will provide a comprehensive discussion about the status of women's rights in Egypt from the 1980s to 2008, emphasizing in particular Egyptian reservations to CEDAW as depicted in national and shadow reports to the CEDAW Committee. Further discussion will take place in Chapter 7, when I discuss Egyptian and Tunisian compliance with article 5 (a). My main argument in concluding this chapter is to show how the intellectual interventions discussed in the previous part prepared Egypt for the ratification of CEDAW and to show how the state's motivations influenced these changes.

III. Egyptian feminism before CEDAW

In 1910, the progressive nationalist party Al Umma published the essays and speeches of Malik Hifni Nasif, who has been better known by her pen name Bahithat al Badyiah. In 1911, 'Bahithat al Badiya became a pioneer in feminist activism' because she wrote to the Egyptian National Congress to ask for women's rights in education and employment and to allow women to 'participate in congregational worship in mosques'.[111]

During the national revolution between 1919 and 1922, Egyptian feminists united with the nationalists for the sake of the state's independence. However, at that time not all nationalist parties supported feminism. For example, while the Umma Party

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[110] Ziba Mir Hosseini, 'Criminalizing Sexuality: Zina Laws as Violence Against Women in Muslim Contexts' (2010) *The Global Campaign to Stop Killing and Stoning Women and Women Living Under Muslim Laws* 1, 24.

[111] Badran, 'Competing Agenda', above n 5, 205.

which was led by Ahmad Lutfy Al Sayyid and other men of the upper class supported feminism, the Watan Party which was led by Mustafa Kamil and other men from the middle class was opposed to feminism because they considered it to be Westernization. While the Umma Party advocated a secular society, the Watan Party advocated an Islamic society.[112] In 1920, Egyptian feminists were recognized as a social force when they were included in the Wafd Party as a women's committee.

A.   Post-independence 1923–1952

Following nominal political independence from Britain in 1922, the alliance of male nationalists professing liberal ideologies did not keep their promise to women to integrate them into public life. The victory of the pro-feminist nationalists did not imply the extension of political rights to women. In 1923, Article 3 of the first Constitution of Egypt declared that Egyptians shall be equal before the law regardless of their religion, origin and language. Articles 4, 12, 13, 14, 15 and 16 of the 1923 Egyptian Constitution guaranteed some fundamental human rights principles. They extended the freedom of the individual regarding their practices of their religious rites, freedom of belief, freedom of expression and freedom of the press. Article 17 extended the right to a free education to all Egyptians with an exception that it must not breach public morals or public order. Article 19 made primary education compulsory for boys and girls. Article 20 guaranteed the right of association and assembly. It indicates that 'Egyptians shall have the right to gather in calmness and serenity unarmed. No police personnel may attend their meetings whom they need not inform of such.'[113]

As can be seen, the first Constitution of Egypt in 1923 was relatively liberal.[114] However, this does not mean that the Constitution enabled democracy to take place in Egypt during that period. According to James Feuille, democracy was not possible in Egypt despite this relatively liberal Constitution because of the interference of the British in Egyptian politics and policy making, and 'the king's overwhelming

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[112] Ibid 206.
[113] 1923 Egyptian Constitution, unofficial translation prepared by Joy Ghali on behalf of International IDEA (www.idea.int); Norman Bentwich, 'The Constitution of Egypt' (1924) 6(3) *Journal of Comparative Legislative and International Law* 41.
[114] Mahmoud Hamad, 'The Constitutional Challenges in Post-Mubarak Egypt' (2012) 14(1) *Insight Turkey* 51, 52; David Govrin, 'Hala Mustafa and the Liberal Arab Predicament' (2010) 17(2) *Middle East Quarterly* 41.

power'.[115] King Fu'ad and later his son, King Faruq, had the upper hand over Parliament. They had the right to appoint two-fifths of the Senate. Also, they had the right to veto any bill of Parliament.[116]

Despite the barriers to democracy in Egypt, the relatively liberal Constitution enabled relative freedom for social movements in the period between 1923 and 1952. This period witnessed the establishment of the Egyptian Feminist Union (founded by Huda Ash'rawai in 1923), the Muslim Brotherhood (founded by Hassan al-Banna),[117] the Muslim Women's Association (formed by Zainab al-Ghazali in the 1930s), the National Feminist Party (founded by Fatma Nimat Rachid in 1944), and the League of University and Institutes' Young Women (founded by the socialist feminist Inji Aflatun in 1945). Also, in 1948 Doria Shafiq founded the Daughter of the Nile Union (Bint el-Nile) and socialist feminists founded the provisional National Feminist Association. Also, Ciza Nabrawi founded the Committee of Youth.

B.   Egyptian feminists and Egyptian women's groups

This section provides an overview of the history of Egyptian feminism between 1923 and the 1950s. In her discussion of Egyptian feminists and women's groups in Egypt, Rabab El-Mahdi writes:

> [It should be understood that] a women's movement is not only determined as such through the sex of its constituency and participants, but also through its goals and declared consciousness. That is to not say that every women's movement has to be declared feminist – whatever the meaning given to the word – but it also does not mean that any movement that is based on female membership is a women's movement.[118]

This section differentiates between the Egyptian feminist groups and women's groups who engaged with the Islamist movement. The Group of Muslim Sisters (founded by the founder of the Muslim Brotherhood), which will be discussed later, and the Muslim Women's Association cannot be considered feminist groups. Such groups are

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[115] James Feuille, 'Reforming Egypt's Constitution: Hope for Egyptian Democracy?' (2011) 47 *Texas International Law Journal* 237, 240.
[116] Ibid.
[117] I include this religious conservative organization here for two reasons. First, the organization was founded during this time. It might be useful to mention it to show that the Egyptian historical period between 1923 to 1952 witnessed the foundation of various organizations. Secondly, although the Muslim Brotherhood is not a women's organization, it played a role in the women's rights advocacy movement in the history of Egypt. As I will show later in this chapter, the Muslim Brotherhood established women's groups that worked under its wing.
[118] Rabab El-Mahdi, 'Does Political Islam Impede Gender-Based Mobilization? The Case of Egypt' (2010) 11(3–4) *Totalitarian Movements and Political Religions* 379, 380.

neither secular feminist nor Islamic feminist. In simple terms, Islamic feminism, which was discussed in more detail in Chapter 2, is a kind of feminism that uses methods that can be interpreted through the lens of the background-vernacularist approach as using religious tools, which are one part of cultural tools, in order to defend the equality of women in Islamic countries.

Unlike Islamic feminism, women's groups, like those mentioned above, defend existing cultural practices. The aim of such women's groups is not the equality of women. Rather, they support the dominant religious discourse about the role of women. They do not pay attention to international human rights discourse because they consider it part of the Westernization project. This kind of women's group, which we might not consider feminist, are the preferred women's groups for Islamists or political-religious organizations because they do not pose any challenge to them. Rather, they serve the agenda of political-religious groups because they defend their principles and visions about women. In addition, they serve the political-religious groups' interests by recruiting and mobilizing other women. As Michele Brandt and Jeffrey Kaplan note, 'many of the Islamist groups in Egypt and elsewhere, while confronting the government, rely upon educated, activist women as part of their movements'.[119]

An attempt to identify the main turning points in the history of Egyptian feminism during that period as either successful or not would be simplistic, as the history of the development of the Egyptian feminist movement is detailed and complicated. My main purpose is not to discuss the history of Egyptian feminist organisations in detail, but rather to examine how both the deployment of cultural tools and discourse and the state's willingness to support change can be seen to have paved the way for Egyptian ratification of CEDAW. This section also attempts to give an overview of Egyptian feminists' critiques of each other as one manifestation of the historical development of Egyptian feminism during that period.

1. Egyptian feminist groups

As I mentioned previously, the first specifically feminist organization in Egypt was the Egyptian Feminist Union (EFU), founded by Huda Sha'rawi in 1923. The EFU

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[119] Brandt and Kaplan, above n 4, 115.

has been criticized by some Egyptian feminists.[120] First, as some Egyptian feminists at that time argued, the EFU did not pay close attention to the importance of the economic situation as one of the reasons for women's human rights violations. Secondly and related to the first point, the core members of the EFU were from the upper class and membership was not open to all women. This point encouraged Doria Shafiq and Fatma Nimat Rachid to establish the National Feminist Party (NFP) in 1944.[121] According to Akram Khater, while Huda Sha'rawi, and her feminist followers in the EFU 'never departed from Islamic notions of morality', the discourse of the second generation of Egyptian feminists such as Doria Shafiq and Inji Efflatoun was more progressive and secular than Sha'rawi's discourse had been, a point which I will return to shortly.[122]

Following the establishment of the NFP in 1944 and the death of Sha'rawi in 1945, Shafiq established the Bint el-Nile Union (the Daughter of Nile Union) in 1948.[123] Shafiq focused on the protection of women inside the family and attacked polygamy. She also made efforts to find jobs for unemployed women. Despite her alliance with socialist feminists, Shafiq's women's human rights advocacy could be considered liberal feminist because Shafiq and her followers were convinced that Egyptian women's inferior status would not be changed if women were not enabled to reach decision-making positions. Her advocacy was primarily devoted to the political rights of women. However, Shafiq's feminist project did not satisfy all Egyptian women activists for women's human rights.[124] Socialist feminists, such as Inji Efflatoun, argued that the inferior status of Egyptian women was a result of imperialism, colonialism, class oppression and the economic circumstances of women.[125] Thus, while the first generation of Egyptian feminists prioritized achieving legal equality of women in the Constitution and through legislative reform, socialist feminists argued

[120] Mary Ann Fay, 'International Feminism and the Women's Movement in Egypt, 1904–1923: A Reappraisal of Categories and Legacies' (Paper presented at the Institutions, Ideologies and Agencies Changing Family Life in the Arab Middle East Conference, North Carolina, September 2003).

[121] Rula B Quawas, '"A Sea Captain in Her Own Right": Navigating the Feminist Thought of Huda Shaarawi' (2006) 8 *Journal of International Women's Studies* 219.

[122] Akram Khater and Cynthia Nelson, 'Al-Harkah Al-Nissa'iah: The Women's Movement and Political Participation in Modern Egypt' (1988) 11(5) *Women's Studies International Forum* 465, 468.

[123] Nadje Sadig Al-Ali, *Secularism, Gender, and the State in the Middle East: The Egyptian Women's Movement* (Cambridge University Press, 2000) 64.

[124] Human Rights Watch, *Divorced From Justice: Women's Unequal Access to Divorce in Egypt* (Human Rights Watch, 2004) 9.

[125] Al-Ali, *Secularism*, above n 123, 65.

that, while this achievement could be significant, it would be insufficient to promote the interests of women.

However, it can be argued that, despite the different perspectives of Egyptian feminists during this period, they also had significant similarities. First, their organizations and activism could be considered part of the feminist mainstream because their main goal was the empowerment of women in Egyptian society. Second, there was little difference between their discourse and international feminist discourse. There were in particular many crossing points and interactions between their discourse and the Western feminist discourse of the time. Therefore it was no surprise that many Egyptian feminist organizations and members participated in international women's human rights and feminist conferences. Third, many Egyptian feminist organizations were operated by upper-class and middle-class women. Many of them were educated in Western countries or in the most prestigious university in Egypt. For example, many of the Egyptian feminist journals at the time were written in French.[126]

2.   Egyptian women's groups

It is also worth noting that women's activism between 1923 and the 1950s did not come only from Egyptian feminist organizations. Rather, there were women's groups whose aims were inconsistent with the Egyptian feminist discourse. Women's groups such as the Muslim Women Society, headed by al-Ghazali, and the Group of Muslim Sisters, which was established as the women's department of the Muslim Brotherhood in 1933, adopted Islamist discourse and views about women. These groups' main position on women's status was that women should submit themselves to serving their family, which was their proper place, and adopt modest dress.[127]

In April 1933, Al-Banna established *firqat al Akhwat Al Muslimat* (the Group of Muslim Sisters). The main work of this group was to educate women in mosques. The Muslim Brotherhood's newspaper in its second edition on 22 July 1933 published the inaugural regulations of the Group of Muslim Sisters. Article 2 declared that the

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[126] Guity Nashat and Judith E Tucker, *Women in The Middle East and North Africa* (Indiana University Press, 1999); Younis, above n 33.

[127] Nadje S Al-Ali, *The Women's Movement in Egypt, With Selected References to Turkey* (United Nations Research Institute for Social Development, 2002).

purpose of the formation of this group is an adherence to Islamic morals and a call to virtue. Article 3 declared the means and methods of the group, which were giving lessons and lectures in women's communities and giving them advice.[128] They also intended to write and publish for this purpose. Article 4 declared that any Muslim woman could be considered a member of this group if she wanted to work towards the principles of the group and swear to God that she holds the ethics of Islam and the call to virtue. Article 5 states that the General Guide of the Muslim Brotherhood is the leader of the group.[129]

The discourse and activism of these Egyptian women's groups was consistent with the Muslim Brotherhood. Their work was based on the strategy of the Muslim Brotherhood to Islamize society. The main idea of the Islamization strategy was based on al-Banna's argument about the necessity of creating a pious Muslim society.[130] Thus, if there was a pious Muslim society, the political Islamists could rule the

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[128] It should be noted that, as we can see, the Muslim Brotherhood gave women a space in the public arena. This indicates that, while girls' education was resisted in the nineteenth century, the cultural background regarding this had altered. Therefore, we can see that a religious and conservative organization such as the Muslim Brotherhood engaged women in its activism, and gave them work educating other women in mosques and university campuses. It also encouraged them to publish and interact with the media. Although the discussion of Islamist women who engaged in the Islamist movement is interesting, I will not focus on this discussion for two reasons. First, my argument is how cultural tools and discourse were deployed for the advancement of women in the history of Egypt. The discussion of Islamist women is not part of my argument because, as I will mention later in this chapter, Islamist women's discourse does not seem to deploy cultural tools or discourse for the advancement of women. Rather, Islamist women's discourse is in line with the arguments of patriarchal religious discourse. It has been often used as an argument to support religious and patriarchal discourse. Second, it is beyond the scope of this chapter to include a comprehensive discussion and it is not necessary to my main argument. However, for a discussion of how Islamist women interact in mosques and how they educate each other see Saba Mahmood, *Politics of Piety: The Islamic Revival and the Feminist Subject* (Princeton University Press, 2005); Arzoo Osanloo, *The Politics of Women's Rights in Iran* (Princeton University Press, 2009).
[129] Ikhwan Wiki, *Awal La' iha lil al-Akhwat al-Muslimat* [The First List of Muslim Sisters] <http://www.ikhwanwiki.com/index.php?title=أول لائحة للأخوات المسلمات>; see also Lamia Rustum Shehadeh, *The Idea of Women in Fundamentalist Islam* (University Press of Florida, 2003); Saleha Mahmood Abedin, *Women in Islam: A Discourse in Rights and Obligations* (International Islamic Committee for Women & Child, 1999); Miriam Cooke, *Women Claim Islam: Creating Islamic Feminism Through Literature* (Routledge, 2001).
[130] For a discussion of the Muslim Brotherhood's effective strategy of Islamizing Muslim societies in Western countries for the purpose of gaining representation in Western governments, see Lorenzo Vidino, *The New Muslim Brotherhood in the West* (Columbia University Press, 2010); Caroline Fourest, *Brother Tariq: The Doublespeak of Tariq Ramadan* (trans Ioana Wieder and John Atherton, Encounter Books, 2007).

government or at least influence legislative reforms and political decision making because they would have strong support from below.[131]

The movement to Islamize Muslim society focuses on investigating religious texts, history and publishing their argument in books and journals. In addition, it relies on persuasion and preaching in public.[132] It aims to strengthen the Islamic religious background. For women who work within this strategy, their proper place is mosques and university campuses.[133]

However, despite the size of these social movements, many of these organizations were later disabled or restricted during the period of the socialist state (1956–1970), as I will discuss in the following section.

C.   *Egyptian socialist state from the 1950s to 1970*

The Egyptian socialist state period, under the government of Gamal Abdul Nasser from the 1950s to 1970, was a difficult period for both the feminist and Islamist movements.[134] Many feminist and Islamist organizations and journals were banned and some feminists and Islamists were jailed or persecuted under the new police powers.[135] Freedom of expression was restricted. Abdul Nasser's government made a compromise with the main religious institution in Egypt, al-Azhar, in order to defeat the Muslim Brotherhood's discourse and movement. Abdul Nasser offered the Muslim Brotherhood a compromise, but the latter placed some conditions on this compromise. One of these conditions, according to Abdul Nasser, was the

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[131] Olivier Roy and Carol Volk, *The Failure of Political Islam* (Harvard University Press, 1996) 194–200.

[132] For a discussion of these strategies see Mohammed Ayoob, *The Many Faces of Political Islam: Religion and Politics in the Muslim World* (University of Michigan Press, 4th ed, 2011).

[133] Mervat Hatem points out that the Muslim Brothers used persuasion to attract and encourage both young men and women to become practising and devout Muslims. Mervat F Hatem, 'Egyptian Discourse on Gender and Political Liberalization: Do Secularist and Islamist Views Really Differ?' (1994) 48(4) *Middle East Journal* 661, 670.

[134] For a discussion of the historical emergence of Marxism and socialist states in Arabic countries such as Egypt, Iraq and Syria see Rudolf Theodore Zarzar, *Arab and Islamic Socialism: An Ideology Study* (PhD Thesis, University of North Carolina, 1976) 20–54.

[135] For example, when the Egyptian feminist Doria Shafiq protested in front of the Indian embassy in Egypt to promote women's rights and to protest against Nasser government policies, Abdul Nasser placed her under house arrest, closed her journal and organization, and prohibited the media from mentioning her name. Also, Abdul Nasser jailed Zainabe al-Ghazali for her protest against the new secular state. See Cynthia Nelson, *Doria Shafik, Egyptian Feminist* (University Press of Florida, 1996).

government had to enact a law to enforce a dress code for women.[136] In the first period of Nasser's government, all political parties were dissolved except the Muslim Brotherhood. But, when Nasser faced an assassination attempt by radical Islamists, he banned the Muslim Brotherhood and prosecuted and persecuted its members and leaders.[137]

In this context, Egyptian feminists found themselves confronted with a difficult challenge because little space was available for women's human rights advocacy. Egyptian feminists at that time were also aware of the negative and positive impacts of the new socialist state. Although Nasser's government restricted freedom of expression, which in turn restricted women's human rights advocacy, and it made a compromise with the main religious institutions and religious scholars, some gains in favour of women's human rights were achieved in the 1956 Egyptian Constitution.[138]

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[136] I would like to summarize and translate some of Abdul Nasser' speech given in Port Said on Victory Day on 23 December 1962. Abdul Nasser stated that in 1953, we really wanted to compromise with Muslim Brotherhood in order to work together in a reasonable way. As Abdul Nasser stated: 'I met the Head of the Muslim Brotherhood (HMB) and he sat with me and made his requests. The first request was that he asked me to make a hijab mandatory in Egypt. And he asked that every woman walks on the street should wear a Tarha (scarf) … and I said in my opinion, this is a personal choice, every man can decide what the rules should be followed in his house. The HMB replied that no because you are the leader this means you are responsible for this. Abdul Nasser replied and reminded the Head of the Muslim Brotherhood that he had a daughter who studied in the Medicine College who does not wear Tarha; and he told him that why did not you put Tarha on your daughter. Abdul Nasser kept arguing that if you cannot put a Tarha on one woman, who is your daughter, how can I put Tarha on 10 million women, myself. Another demand is that women should not be allowed to work because the work may corrupt woman's behavior. In replying to this, Abdul Nasser stated that as we know, we have heard many stories of women who have been in difficult circumstances that led them to have unacceptable manners. So, as Abdul Nasser pointed out, when we allow women to work, we actually protect them from immorality because they will not be forced to do unpleasant things because of their circumstances. Furthermore, as Abdul Nasser pointed out, the HMB keep demanding various things, one of which is closing cinemas and theatres.
Gamal Abdel Nasser, 'President Gamal Abdel Nasser's Speech on Victory Day' (Speech, Port Said, Egypt, 23 December 1965) <http://www.nasser.org/Speeches/SpeechesAll.aspx?CS=1&x=2&lang=en>. See also, Egyptian Presidential, *YouTube*, 28 September 2013 <https://www.youtube.com/watch?v=3eV8L0eVk-w>.
[137] Barbara Zollner, 'Prison Talk: The Muslim Brotherhood's Internal Struggle During Gamal Abdel Nasser's Persecution, 1954 to 1971' (2007) 39(3) International Journal of Middle East Studies 411; Dina Shehata, *Islamists and Secularists in Egypt: Opposition, Conflict and Cooperation* (Routledge, 2009).
[138] As Nadje Al-Ali notes, the 1956 Constitution and its 1963 revised version declare that all Egyptians are equal regardless of gender. This was followed by new labour laws, which 'guarantee state sector jobs for all holders of high school diplomas and college degrees, irrespective of gender'. Moreover, in 1956 the 'state granted women the right to vote and to run for political office'. Al-Ali, *The Women's Movement in Egypt*, above n 127, 7.

Nasser's government used a liberal approach to extend the rights of women to education, public employment and political participation.[139]

D. Emergence of Islamization, 1970–1981

The Egyptian state, under the government of Muhammad Anwar Al Sadat, began to allow the Islamization of Egyptian society in the 1970s by encouraging Islamists, including the Muslim Brotherhood movement. Being afraid of the re-emergence of the socialist and Marxist movements in Egypt, and as part of defeating Marxism in the Arab world in order to promote a strong alliance with the United States, Al Sadat's government decided to give the Islamist movement the green light for the Islamization of Egyptian society. From 1970 onwards, the Egyptian government encouraged several policies to prepare the way to Islamize society and the law in Egypt.[140] One of them was Article 2 of the 1971 Egyptian Constitution, which declared that Islamic Sharia is a 'chief source of legislation'.[141] The Muslim Brotherhood, through the Sharia Committee of the Lawyers' Syndicate, made efforts to promote Sharia law in the Constitution. Tamir Moustafa writes:

> Here, the Shari'a Committee of the Lawyers' Syndicate was simply following the lead of their believer president, Anwar Sadat, who had issued a new constitution in 1971 declaring Islam the religion of the state and the *shari'a* a principal source of law. The language of the 1971 Constitution was further strengthened when Article 2 was amended on 22 May 1980 [two months before Egypt became a signatory to CEDAW on 17 July 1980] to declare, '… the principles of the Islamic jurisprudence are *the* chief source of legislation.' The simple amendment of one word from '*a*' principal source to '*the*' principal source was interpreted by almost everyone as meaning that all laws must be in conformity with Islamic law. What this meant in concrete terms and how this would be put into action was not entirely clear and is still a matter of some debate.[142]

While Al Sadat's government encouraged Islamist discourse and the Islamization of society through religious speeches and pamphlets on university campuses, recruiting men and women to be members of the Islamist movement and encouraging the Islamic dress code, it also promoted the feminist project. This feminist project was

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[139] Hatem, above n 133, 667.

[140] Carrie Rosefsky Wickham, *The Muslim Brotherhood: Evolution of an Islamist Movement* (Princeton University Press, 2013) 20.

[141] Ibid 31.

[142] Moustafa, above n 36, 617. Moustafa adds: 'Islamist-oriented student groups took control of student unions and became the dominant political trend on campuses across Egypt.' Ibid. For more discussion of Article 2 of the 1971 Egyptian Constitution and how it was deployed by Islamists in the Veil Case and Child Support Case in the 1990s see Clark B Lombardi, 'Islamic Law as a Source of Constitutional Law in Egypt: The Constitutionalization of the Sharia in a Modern Arab State' (1998–1999) 37 *Columbia Journal of Transnational Law* 81, 102–13.

sponsored by the state because the state did *not* want independent feminist organizations and it later changed its attitude to the alliance with the Islamists.[143] In this sense, the Egyptian state attempted to adopt an official feminism, which meant that feminism was not independent. The main purpose of the adoption of an official feminism was to ensure that it would follow the state's political agenda. It was neither purely secular nor Islamist.[144] In November 1979, a new personal status law that expanded women's rights in marriage and divorce was enacted. This law was influenced by Al Sadat's wife, Jehan, and is informally known as Jehan's law.[145] This law guarantees a woman's right to initiate divorce and limits polygamy, and provoked controversy among the religious and conservative mainstreams.[146]

IV. Conclusion

As has be seen in this chapter, the deployment of cultural tools and discourse as well as the state's willingness to promote change played a crucial role in the advancement of women's status in Egypt. In this sense, Egypt was relatively well prepared for ratifying CEDAW. This means that neither women's human rights issues nor feminist discourse were strange for both the authorities nor for many strands of societies.

As I have shown in this chapter, women's human rights discourse was influenced by both colonialism and the state's willingness to modernize. This encouraged some Egyptian intellectuals to find a way to argue for the advancement of women's status. The main approach taken by those intellectuals was the deployment of cultural tools and discourse. Their cultural capital and hybrid discourse enabled their argument to be influential.

However, as I have pointed out previously, cultural tools and discourse are not sufficient by themselves. Such cultural discourse, indeed, was accompanied by the state's willingness to grant a symbolic status to women's advancement, which in turn

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[143] Hatem writes:

> In the honeymoon period between the secularist state and its Islamist allies (1971–76), the government argued that Islam offered a good definition of the types of jobs suited to women's nature, provided that they dressed modestly, in accordance with sharia, and that work did not interfere with their family obligations. When the state parted ways with Islamists in 1977, following the assassination of the minister of religious affairs, the state adopted a different interpretation of sharia and used gender to rehabilitate its liberal credentials.

Hatem, above n 133, 667.
[144] Chapter 5 will discuss the feminist state and official feminism in more detail.
[145] Wickham, above n 140, 32.
[146] Al-Ali, *Secularism*, above n 123, 74.

enabled the emergence of the feminist movement. It is true that, as I have shown in this chapter, although Egypt had experienced the longest and most varied history of feminism in the Arab world, feminist organizations were not allowed to be independent. But, this did not prevent the relative advancement of women's status in Egypt.

On this basis, it can be argued that we need to understand the complexity involved in Egypt's justification of their reservations to CEDAW on religious reasons. Although religious justifications can be deployed against women's human rights, they can also in some cases be deployed for the advancement of women's rights. An obvious example relates to women's legal status in Tunisia, which will be discussed in the next chapter. It should be noted that, while the deployment of cultural tools and discourse prepared the way for the emergence of the feminist movement in Egypt in the social context, the deployment of cultural tools and discourse enabled Tunisia to reform its personal status law in favour of women. In other words, while Egypt was relatively progressive in its political-social movements, Tunisia was relatively progressive in the legal context regarding women's rights.[147]

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[147] In her report published in 1981, which described her interview with Nawal El Saadawi, Sarah Graham-Brown stated, quoting El Saadawi:

> 'It's people's awareness and their political power that really protects them. With regard to marriage law, there was some marginal reform, but not in the essence – for instance, polygamy still exists: a women [sic] herself cannot divorce. There is no equal treatment in marriage and divorce law between men and women. But the Egyptian woman is having her equality by her power not by the law' … She [El Saadawi] contrasts the situation in Egypt with that in Tunisia, 'where there is a very advanced law on marriage and divorce but the reality of the Tunisian women is still backward.' She [El Saadawi] put very strong emphasis on the need for women to organize themselves politically.

Sarah Graham-Brown, 'Feminism in Egypt: A Conversation With Nawal Sadawi' (Women and Work in the Middle East, 1981) 24, 27.

Chapter 5

The background-vernacularist approach and the state's willingness to promote women's human rights: Tunisia as a case study

I. Introduction

This chapter discusses the historical turning points of women's human rights in Tunisia before it became a signatory to CEDAW. In this chapter, I attempt to show that Tunisia is a good example of a state in the Arab world that promotes women's human rights through a top-down approach, and through the deployment of cultural tools and values. As I will discuss later, Tunisia was an authoritarian regime until the uprising known as the Arab Spring in 2011. This means that, although the state was willing to promote improvements in women's status in Tunisia, the translation of this willingness into gendered legal reforms did not provide space for independent feminist voices to take their place in Tunisian society. This is because the Tunisian government attempted to establish an official or state feminism which precluded independent feminist discourse and activism.

In this sense, this chapter attempts to show that the early advocacy for Tunisian women's human rights was initiated by the state. There was no independent feminist movement or pressure from below to advance women's human rights at the time of the establishment of the Tunisian Code of Personal Status in 1956. Although feminists did not influence the first wave of legislative reform in favour of women in Tunisia, such legislative reforms enabled the emergence of a feminist movement in the 1990s because the legislative reforms enabled women to change their status in the public and private spheres.[1]

This chapter is divided into two main parts. Part II discusses al-Tahir al-Haddad's book, *Our Woman in Sharia and Society*, which was published in 1930. This part re-interprets some of al-Haddad's arguments through the lens of the background-

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[1] Nessryne Jelalia, 'Still a Long Way to Equality for Tunisian Women', *alaraby*, 14 January 2015 <http://www.alaraby.co.uk/english/comment/2015/1/14/still-a-long-way-to-equality-for-tunisian-women>.

vernacularist approach and attempts to show how al-Haddad asserted the 'non-foundational foundation' of the inferior status of women in Islam. In addition, it attempts to show how al-Haddad made 'strange what had appeared familiar'.

This chapter is not however devoted to re-interpreting all of the points al-Haddad raised in his book. I have selected some of al-Haddad's arguments in order to show how cultural tools – including religious tools such as *ijtihad* – and values can be deployed to challenge the cultural or religious background and 'make strange what had appeared familiar'. For this purpose, I have chosen al-Haddad's arguments about women's testimony in Islamic jurisprudence and against the exclusion of women from the public sphere.

Part III briefly discusses the 1956 Tunisian Code of Personal Status. The main arguments in this part are that Tunisia promoted women's status by deploying cultural tools and values, and that it was willing to do so as part of its modernization program. As I will discuss in this chapter, many points raised by al-Haddad's book influenced gendered legislative reforms in Tunisia.

II. Using cultural tools to challenge the cultural background

This part discusses some of the arguments that al-Tahir al-Haddad introduced in his book *Our Woman in Sharia and Society* and their relevance to challenging the cultural background of the inferior status of women.

Al-Haddad was born in 1899. He was born in the year of publication of Qasim Amin's *The Liberation of Women*, which was discussed in Chapter 4. Al-Haddad studied at a Quranic school, after which he studied Islamic sciences in the Greta Mosque of Zaytouna. In 1920, he obtained certification as a notary from Zaytouna's mosque.[2]

After his graduation, al-Haddad started writing short articles in national journals. He also joined the Destour Party, which advocated social justice, democracy and

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[2] Ziba Mir-Hosseini, 'Justice, Equality and Muslim Family Laws: New Ideas, New Prospects' in Ziba Mir-Hosseini, Kari Vogt, Lena Larsen and Christian Moe (eds), *Gender and Equality in Muslim Family Law: Justice and Ethics in the Islamic Legal Tradition* (I B Tauris, 2013) 7, 13.

modernization in Tunisia.[3] Such activities deepened his thinking about the situation of workers and women in Tunisia. In 1927, al-Haddad published a book on labour law. Three years later, he published *Our Woman in the Sharia and Society*.[4]

Al-Haddad's arguments are significant for several reasons. Some scholars and women's rights observers in the Middle East have argued that al-Haddad's book comprises the philosophical doctrine behind the 1956 Tunisian Personal Status Code (PSC), especially the family law concerning women's status, as I will explain later. Furthermore, he was a well-known Tunisian reformer and supporter of the enhancement of women's status in society and law.

Tunisia's initial report to the CEDAW Committee, which was submitted in 1994, indicated that the Tunisian 1956 PSC could be considered 'a civil code of Islamic inspiration, which has chosen the provisions of the doctrine of different Islamic traditions'.[5] In addition, it noted that a modernist and reforming movement in the Arab Muslim world 'began to emerge in Tunisia in the 1930s, led by Tahar Haddad [in Arabic this is written al-Tahir al-Haddad], a renowned reformer and proponent of women's emancipation'.[6]

In its initial report, Tunisia wrote:

> 63. A modernist and reforming trend in the Arab-Muslim world began to emerge in Tunisia in the 1930s, led by Tahar Haddad, a renowned reformer and proponent of women's emancipation.

> 64. 'Islam is unfairly accused of thwarting progress, but is in fact the quintessential religion of progress. Our decline only came about as a consequence of the fantasies with which we had filled our heads and the scandalous and static customs which imprisoned us', wrote Tahar Haddad in the introduction to his work 'Our Women in the Sharia and Society'.

> 65. Indeed, rather than dealing with the question of women's emancipation as a separate matter, the reform movement included it in the larger context of national liberation.[7]

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[3] The Destour Party was founded by Abdelaziz al-Thaalbi on 4 June 1920. Its main aim was to liberate Tunisia from French colonialism. On 2 March 1934, it was replaced by the Neo-Destour Party, led by Habib Bourguiba. See Clement Henry Moore, 'The Neo-Destour Party of Tunisia: A Structure For Democracy?' (1962) 14(3) *World Politics* 461; John Pike, 'Rise of Nationalism', Globalsecurity.org <http://www.globalsecurity.org/military/world/tunisia/french-protectorate-3.htm>.

[4] Mir-Hosseini, above n 2, 14.

[5] Committee on the Elimination of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention: Combined Initial and Second Reports of State Parties: Tunisia*, UN Doc CEDAW/C/TUN/1–2 (12 April 1994) [915].

[6] Ibid [63].

[7] Ibid [63]–[65].

A second reason for al-Haddad's significance is that he advocated the empowerment of Tunisian women through challenging the cultural background that constituted the inferior status of women.[8] Al-Haddad was not completely successful in this in his lifetime. But at least he initiated the attempt to challenge cultural presumptions about women. Furthermore, al-Haddad attempted to deploy the language of the dominant discourse in order to deconstruct it. Al-Haddad attempted to deploy patriarchal and religious discourse to challenge another patriarchal and religious discourse. Therefore, al-Haddad's argument might not be seen as feminist from a contemporary feminist perspective.[9] Rather, it might be seen as a patriarchal and outdated argument. Despite this, it is still useful to re-interpret some of al-Haddad's arguments through the lens of the background-vernacularist approach in order to show that cultural tools and discourse were deployed to argue for the enhancement of women's status in Tunisia prior to it becoming a signatory to CEDAW.

A. *'Non-foundational foundation' of Muslim women's inferiority*

Al-Haddad divided his book into two parts. The first part, which comprises five chapters, discussed Muslim women's status in family law including marriage, divorce and inheritance.[10] The second part, which has four chapters and the conclusion, discussed Muslim women's role in Tunisian society. In this part al-Haddad focused on the rights of women to education, participation in public life including employment, and freedom of movement. Like Qasim Amin, who was discussed in Chapter 4, al-Haddad believed that Tunisian society was backward because women were backward. The women were backward because, al-Haddad argued, unlike European women, Tunisian women could not be educated and participate in public

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[8] Ronak Husni and Daniel Newman, who translated the book from the Arabic language in 2007, point out that their translation is based on the premise that the book presents the views of a Tunisian author and reformist who argued for women's human rights based on Islamic legal texts. Furthermore, as Husni and Newman argue, the book 'presents an insider's view of the condition of Muslim women' in Tunisia at that time. It can be argued that this book is the most original work written on women's human rights 'in the early modern period'. The book dealt with a topic that was sensitive at that time 'as it is today in a way that was both novel and creative, while its impact has endured to the present day'. Husni and Newman hoped that 'this book will increase attention for the most courageous of reformers who may justifiably lay claim to being the first Muslim feminist'. Al-Tahir Al-Haddad, *Muslim Women in Law and Society* (Ronak Husni and Daniel Newman trans, Routledge, 2007) xi..
[9] Ziba Mir-Hosseini argued that al-Haddad's book was a feminist text because it went much further than the pro-feminist intellectuals who argued for the promotion of women's status in the Islamic law context at that time. This was because he advocated the equality of women in inheritance and because of his re-definition of marriage. Mir-Hosseini points out that al-Haddad 'offered a definition of marriage that was premised on mutual affection and responsibility'. Mir-Hosseini, above n 2, 13.
[10] Al-Haddad, above n 8.

life.[11] There was harsh segregation between the public and private sphere, where women were confined for housework and rearing children, while the men entertained themselves outside their homes. Al-Haddad believed that Tunisian men were selfish and part of the problem of the backwardness of the Tunisian society because they kept their women ignorant and isolated from public life.

Using the background-vernacularist approach as a lens through which to understand his work, I would argue that al-Haddad asserted a 'non-foundational foundation' for the inferiority of women in Islam, which he then used to challenge the cultural or religious background. In doing so, al-Haddad deployed *ijtihad* by focusing on three points: the spirit and aims of Sharia, the 'policy of gradualism' that governed the process of legislation in Quran and Sunna, and women's circumstances.

1.   The spirit and aims of Sharia

As al-Haddad argued, many Islamic legal scholars followed literal interpretations of theological texts. This, in turn, prevented them from recognizing the need for their societies to develop. In addition, it prevented them from understanding 'the spirit and aims of the Shari'a, which is filled with life's treasures and offers succour to those who require it'.[12] Al-Haddad found it regrettable to realize that some Islamic legal scholars were aware of the importance of the development of Islamic law, which is needed and protected by Islamic Sharia, but they did not make sufficient efforts to achieve it.[13] Although they were aware of its importance, al-Haddad found that such scholars had not made any effort to achieve the spirit of Sharia, which encourages kindness and appreciates freedom.[14] However, the Islamic legal scholars who attempted to find a remedy for the underdevelopment of Muslim societies, al-Haddad

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[11] In Chapter 4, I have provided *briefly* some postcolonial theorists' interpretations of colonial discourse about the status of women in colonized countries. As I pointed out in Chapter 4, for some postcolonial theorists, Western feminism was deployed by colonials – in Egypt, for example – to insult the Other's culture and to provide moral justifications for controlling other peoples. However, as I pointed out in Chapter 4, although this interpretation is interesting because it reveals the colonials' double standards, I am not interested in such discussion. This is because my main purpose is to show that cultural tools and values were deployed to enhance women's status.
[12] Al-Haddad, above n 8, 107.
[13] Ibid.
[14] Ibid 49.

argues, 'were regarded as immoral, as if they are waging war on Islam and the Shari'a'.[15]

2. Gradualist approach

In this section I will provide a brief explanation of the gradualist approach to change in Islamic thought and explain how slavery was considered to be an example of gradualism. I will also explain how al-Haddad compared women's rights to the abolition of slavery and argued that achieving women's rights could also be regarded as a gradual change.

The gradualist approach in Islamic thought refers to what Azizah al-Hibri calls the 'Quranic philosophy of change'.[16] Al-Hibri writes:

> [t]he Quranic philosophy of gradualism is predicted upon the fact that fundamental changes in human consciousness do not usually occur overnight. For this reason, the Qur'an uses a gradual approach to change entrenched customs, beliefs and practices, except in fundamental matters, such as the belief in the unicity of God and the prophethood of Muhammad … The Qur'an flatly prohibits behaviour which conflicts with fundamental moral principles. For example, it prohibits murder, and more specifically, female infanticide.' [17]

The Quran – which is believed by Muslims to be the revealed Word of God to the Prophet Muhammed by the archangel Gabriel – was not revealed all at one time. It was revealed gradually as short verses at different times and events. It was revealed, as al-Hibri notes, 'gradually in accordance with the needs and capabilities of society.'[18] According to Leila Sayeh and Andrian Morse, many of the cultural practices and habits which existed in Arab society at the time of the Prophet Muhammed were resistant to challenge and could not be changed fully or quickly.[19] Thus, for Sayeh and Morse, gradualism 'was clearly a central feature of this process. Little by little, the verses revealed to the Prophet modified the customs and usage of the Arabs in order to prepare them for the fully revealed Word of God.'[20]

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[15] Ibid 108.
[16] Azizah Yahia al-Hibri, 'Muslim Women's Rights in the Global Village: Challenges and Opportunities' (2000-2001) 15 (1/2) *Journal of Law and Religion* 37.
[17] Ibid, 56.
[18] Azizah al-Hibri, 'Islamic Constitutionalism and the Concept of Democarcy' (1992) 24 *Case Western Reserve Journal of International Law* 1, 10.
[19] Liela P. Sayeh and Adrian M. Morse, 'Islam and the Treatment of Women: An Incomplete Understanding of Gradualism' (1995) 30 *Texas International Law Journal* 311, 320.
[20] Ibid.

The most frequent example that has been provided to explain the gradualist approach of the Quran is the prohibition on drinking wine.[21] In the pre-Islamic and early Islamic era Arab people consumed wine as an everyday social habit. In order to prohibit the drinking of wine, the Quran made the prohibition in gradual stages. In the first stage, it revealed verses that explain that there are advantages and disadvantages in consuming wine.[22] In the second stage, the Quran prohibited believers from praying while they are drunk.[23] The final stage was 'an outright and absolute interdiction of all intoxication and of gambling in all circumstances'.[24]

Sayeh and Morse notes: '[T]he idea of gradualism complements the notion that Islam is a further step along the path to a greater understanding of God.'[25] In this sense, the gradual changes in Islamic law should not be understood as something that stopped with the death of the Prophet. In his argument for women's rights in Tunisia, al-Haddad relied on this idea. Al-Haddad wrote:

> There is no reason to believe that the gradual changes that took place in the life of the Prophet should have been the last of the changes and that they would stop after the passing away of the Prophet. The gradual changes in the *Shari'a* law took place at a pace that could be sustained by society and there are clear examples to testify to that.[26] I am not going to talk about the issue of alcohol which was dealt with prior to the Prophet's demise. Instead, I should like to focus on the question of slavery.

In telling a story about the abolition of slavery, al-Haddad did not want to compare women to slaves or to prove that the Quran had prohibited slavery, in the way that it had prohibited wine. The conclusion that al-Haddad wanted to make can be understood through the following logic: at the time of the Prophet slavery was a practice that the Quran had not prohibited, which made some religious scholars argue

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[21] al-Hibri, 'Muslim Women's Rights' above n 16 at 56.

[22] Verse 219 of Chapter 2 [the name of Chapter 2 is Surat al-Baqarah, which means the Chapter of The Cow] states that: 'They ask you about wine and gambling. Say, "In them is great sin and [yet,some] benefit for people. But their sin is greater than their benefit." *The Quranic Arabic Corpus - Translation* Corpus.quran.com <http://corpus.quran.com/translation.jsp?chapter=2&verse=219>.

[23] Verse 43 of Chapter 4 [the name of Chapter 4 is Surat al-Nisaa, which means the Chapter of The Women] states that: 'O you have believed, do not approach prayer while you are intoxicated until you know what you are saying'. See *The Quranic Arabic Corpus - Translation* Corpus.quran.com <http://corpus.quran.com/translation.jsp?chapter=4&verse=43>.

[24] Sayeh and Morse, 'Islam and the Treatment of Women' above n 19 at 320. Verse 90 of Chapter 5 [The name of Chapter 5 is Surat al-maidah, which means the Table spread with Food] states that: 'O you who have believed, indeed, intoxicants, gambling, [sacrificing on] stone altars [to other than Allah], and divining arrows are but defilement from the work of Satan, so avoid it that you may be successful.' See *The Quranic Arabic Corpus - Translation* Corpus.quran.com <http://corpus.quran.com/translation.jsp?chapter=5&verse=90>.

[25] Sayeh and Morse, 'Islam and the Treatment of Women' above n 19 at 318.

[26] Al-Haddad, above n 8, at 48.

in favour of it because it was part of God's Word. But, despite this fact, slavery was abolished because in the current era enslavement is considered to be a criminal act. The political, economic, and social circumstances had changed, which made enslavement unacceptable for all nations. Hence, if slavery could be abolished because changes occurred to the political, economic, and social circumstances of Muslim-majority societies, many women's rights issues in Islamic law could also be changed. Women's rights to education, testimony, and inheritance should be reformed in Islamic law because the current political, economic and social circumstances had changed.[27]

This can be considered through the lens of the background-vernacularist approach. Using the example of the abolition of slavery as evidence for reforming women's rights in Islamic law could be considered as the presentation of a new story or truth. According to the guidelines for challenging the cultural background, as discussed in Chapter 2, it is not wise to critique an old truth merely by presenting a new truth, unless the elements that built the old truth are also changed. In order to critique an old truth, the new truth or story should be constructed on the basis of the original story or truth. This new story should be directed to the advantage of the new discourse. According to this logic, it could be argued that when al-Haddad used the abolition of slavery as an example to argue for the possibility of promoting women's human rights in the Islamic context, he did not start from the idea that gender inequality in Islamic law should be abolished because slavery was abolished. Rather, he started by drawing upon the old story of the gradualist approach of Sharia that suggests that political, economic, and social changes should be taken into account. He built upon the

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[27] Here I summarized the main idea of al-Haddad's argument of slavery. There is a parallel argument between my summary of al-Haddad's argument and the argument made by Asghar Ali Engineer. Engineer writes:

> Muslim jurists and theologians quoting the Holy Qur'an continued to justify slavery throughout the Middle Ages and laid down elaborate rules of behaviour for slaves as well as for their ownership, possession and disposal. To own slaves was considered a 'natural right' in Muslim societies throughout the medieval period, just like owning any immovable property. A slave who ran away from his master was regarded as a 'sinner'. Now that slavery has been abolished and is regarded as intolerable by all civilised societies, no one invokes the scripture to justify it and no one insists upon that 'divine right' vested in those who owned slaves … Thus, the theory of Divine Law is no longer applicable to the institution of slavery. Human consciousness in modern society is conditioned by the concept of human rights and human dignity. The laws regarding women drawn up during the medieval period by the jurists, though based on interpretations of the scriptures, are unlikely to be accepted by women today … Thus the scripture will either have to be abandoned and laws enacted on a secular basis or they will have to be re-read and reinterpreted so as to suit modern conditions.

Asghar Ali Engineer, *Right of Women in Islam* (Sterling Publishers, 3rd ed., 2008) 2.

gradualist concept to make his argument clear and to draw a new picture that was constructed on the original picture.

Al-Haddad's story about slavery and women's rights contained several elements. First, the Muslim state was newly established. This means that Islam as a system of belief had not yet spread, let alone the Islamic political and legal system. Hence, to establish the Islamic state, the early Muslim legislator, the Prophet Muhammed, needed alliances with the Arab tribes who could fight with him to expand the Islamic state.[28] Slaves and women were in the lower classes because they were not supposed to fight in the battles that took place between the Prophet and his adversaries.[29] In this sense, the early Islamic state made the establishment of the state a greater priority than emancipating slaves or promoting women's human rights.[30] It had a political purpose in this first stage. Second, slavery was rooted in Arab society at that time.[31] Hence, the abolition of slavery would have met with strong resistance from the main cultural leaders at that time. At that time, the slave traders were among the wealthier people. In addition, the other wealthier families relied on slaves, especially female slaves, to serve them in their palaces and satisfy their sexual desires.[32]

Having proposed this new story about the attitude of Islam toward the institution of slavery, al-Haddad constructed a similar narrative about women's status in the Islamic context. This will be discussed in the following section.

3. Women's circumstances

For al-Haddad, Islam had granted some rights to women, especially in the areas of testimony and inheritance. In pre-Islamic times women were not allowed at all to inherit or to be witnesses in court proceedings whereas, post-Islam, they were granted

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[28] Ibid 148–53.

[29] It should be noted that some women (who are called female companions [the believers who met or saw the Prophet Muhammed, when he was alive are called companions whether they were females or males] participated in the battle alongside the Prophet Muhammed. The main role female companions play in the battles was working as nurses. See Asghar Ali Engineer, *The Qur'an, Women, And Modern Society* (New Dawn Press Group, 2005) 184-187. David Cook, 'Women Fighting In Jihad ?' (2005) 28 (5) *Studies in Conflict & Terrorism* 375-384.

[30] Al-Haddad, above n 8 at 178–9.

[31] Ibid 180–6.

[32] According to Islamic jurisprudence, marriage for Muslim males is limited to four wives. However, a man can purchase female slaves, with whom he can have sexual intercourse as much as he can. There is no limit to the number of male and female slaves who can be owned by one Muslim male. Ibid 209–11.

some rights to inheritance and to provide testimony. In addition, for al-Haddad, Islam aimed to ultimately achieve equality between men and women. However, Islam took into account women's social circumstances at the time when it decided that 'a woman's testimony is worth half of a man'. I will discuss this later in this chapter.

In discussing testimony, al-Haddad refers to verse 282 of Chapter 2 of the Quran, on the witnesses required for a contract between a debtor and creditor. The verse states:

> O YOU who have attained to faith! Whenever you give or take credit … for a stated term, set it down in writing. And let a scribe write it down equitably between you; and no scribe shall refuse to write as God has taught him: … thus shall he write. And let him who contracts the debt dictate; and let him be conscious of God, his Sustainer, and not weaken anything of his undertaking … And if he who contracts the debt is weak of mind or body, or, is not able to dictate himself … then let him who watches over his interests dictate equitably. And call upon two of your men to act as witnesses; and if two men are not available, *then a man and two women from among such as are acceptable to you as witnesses, so that if one of them should make a mistake, the other could remind her* … And the witnesses must not refuse [to give evidence] whenever they are called upon.[33]

Deploying *ijtihad*, al-Haddad challenged the cultural or religious background that constituted women as inferior to men because their testimony is valued as half of men's. As al-Haddad explained, in all aspects of life at that time in the early era of Islam, women lagged behind men because women had not had equal opportunities to men, in education for example. This made women 'less proficient in intellectual and mathematical tasks'.[34] For al-Haddad, this did not mean that woman's testimony is worth half of a man's because of 'a deficiency in her character as opponents to her emancipation are wont to claim'.[35] Al-Haddad questioned this assumption by asking whether, if the testimony was not about debt, but it had to do 'with something that could be witnessed by sights or hearing, would we accuse woman here of having less developed senses than those of a man, or would we try and justify this on the grounds of a deficiency in her character?'[36]

In addition, al-Haddad challenged the cultural or religious background not only by re-interpreting the Quranic verse cited above. He also re-interpreted the Prophet's Hadith that stated that 'women are lacking intellect and religious devotion'. Al-Haddad

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[33] Emphasis added and numbers omitted. I have used a new translation of this verse not the translation in al-Haddad's book. You can compare various translations of this verse in 'Quran 2:282 English translations' <2pm.co/demo/2500/2/282/>.
[34] Al-Haddad, above n 8, 38.
[35] Ibid.
[36] Ibid .

argued that the validity of this Hadith should be examined, and even if we find that the Hadith is valid in general, some points should be examined. First, as al-Haddad argued, it was not clear that this Hadith 'reflect[ed] on the essential nature of women' as it might be 'a reference to the condition of woman at that time and an explanation for some of her faults'.[37] Second, al-Haddad argued, it might not be easy to be certain about what this Hadith meant without knowing the exact context and reasons that made the Prophet say it.

Furthermore, al-Haddad appealed to the consensus of some scholars of the four Sunni Law Schools on the acceptance of a woman as a judge.[38] As al-Haddad argued, these four Islamic law schools recognized that a woman could be a judge. One of the key founders of the schools – Abu Hanifah al-Numan – had confirmed that in Islam a woman could take a position as a judge. Al-Haddad pointed out that, if it were not acceptable in Islam for a woman to be a judge, early important clerics would not have argued for it or even mentioned it. Al-Haddad therefore argued that it was strange that, while a woman is recognized as a judge in many Islamic law schools, her testimony is valued as less than a man's.

In sum, al-Haddad advocated equality between women and men in giving testimony. He argued that women's circumstances were different in the early period of Islam and in al-Haddad's era. He relied on the policy of gradualism of Islamic law in making his arguments, as well as an emphasis on the spirit and aims of Sharia.

B.   *'Making the familiar strange'*

It can be argued that al-Haddad's argument in the first part of his book was preparing the way for the discussion in the second part, which dealt with Tunisian women's status in society. The main argument in the second part was that women should be

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[37] Ibid.

[38] Malcolm Voyce and Adam Possamai write: 'four Islamic jurisprudential schools emerged in second Islamic century. The four schools were Hanafite, Malikite, Shafi'ite, and Hanbalite, named respectively by their putative founders Abu Hanifa, Malik ibn Anas, Ash-Shafi'I, and Ahmed ibn Hanbal.' See .Malcolm Voyce and Adam Possami, 'Legal Pluralism, Family Personal Laws, and the Rejection of *Shari'a* in Australia: A Case of Multiple or "Clashing" Modernities?' in Adam Possamai, James T. Richardson, and Bryn S Turner (eds.), *Legal Pluralism and Shari'a Law* (Routledge, 2016) 28, 48. See also Christopher Melchert, *The Formation Of The Sunni Schools Of Law, 9Th-10Th Centuries C.E.* (Brill, 1997).

allowed to access the public sphere. Al-Haddad argued against one of the main constraints that women faced, which was the *hijab*.

The *hijab*, for al-Haddad, means covering the face, not just the hair, and exclusion from public life. Using the lens of the background-vernacularist approach, we can understand that al-Haddad deployed patriarchal discourse to deconstruct another patriarchal discourse and to 'make strange what had appeared familiar' in his discussion of the *hijab*. He did this by emphasising its negative aspects. Al-Haddad wrote:

> There is not that big a difference between the thing women use to cover their faces, that is, the *niqab*, and a muzzle that we put on a dog so that it does not bite passers-by. How dreadful is this practice we impose on a young girl, making her feel that she is not trustworthy, except through a material screen. However, we men did not stop there; we have turned this veil into a precondition for leaving the house, permission for which is granted only on very rare occasions, such as for visiting a sick relative, attending a funeral or other such important events. If only we realized that in so doing, we have sapped women's strength and, in effect, taught them weakness.[39]

In his argument al-Haddad defined the *hijab* as 'a way of using religion to hide our [men's] intrinsic selfishness'.[40] Al-Haddad noted the ambivalence around the *hijab*: it 'becomes a wall that we are proud to build around those who stray; however, this religious pretext gradually fades away into oblivion when it suits our purpose and our desires'.[41] Al-Haddad gave an example of this contradiction, which can be considered as making the familiar strange.[42] Al-Haddad wrote:

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[39] Ibid 148. Al-Haddad's argument that women are taught to be weak has a parallel in Mary Wollstonecraft's argument in her *A Vindication of the Rights of Women*. Wollstonecraft wrote:
> Women are told from their infancy, and taught by the example of their mothers, that a little knowledge of human weakness, justly termed cunning, softness of temper, *outward* obedience, and a scrupulous attention to a puerile kind of propriety, will obtain for them the protection of man; and should they be beautiful, everything else is needless, for, at least, twenty years of their lives.

Mary Wollstonecraft, *A Vindication of the Rights of Woman: With Strictures on Political and Moral Subjects, Volume 1* (Johnson, 3rd ed, 1796) 33. There is no clear evidence that al-Haddad had an opportunity to read Wollstonecraft's book despite the fact that al-Haddad's book was published in 1930, while Wollstonecraft's book was published in 1796.

[40] Al-Haddad, ibid 149.

[41] Ibid, 149.

[42] Sandra Harding writes: 'Thinking from the perspective of women's lives makes strange what had appeared familiar, which is the beginning of any scientific inquiry.' Sandra Harding, *Whose Science? Whose Knowledge? Thinking from Women's Lives* (Cornell University Press, 1991) 150. As I have shown in Chapter 2 when discussing the background-vernacularist approach, Susan Hekman suggested that one of the strategies that should be used to challenge the background of social meanings or the cultural background that constitutes the inferior status of women in society is Harding's concept of making strange what had appeared familiar. For more discussion of this concept see Terri Elliott, 'Making Strange What had Appeared Familiar' (1994) 77(4) *The Monist* 424.

One need only look at the adultery committed by men and women alike. A man is praised for doing it, while in the case of women it is considered a vile and shameful deed. If we exclude the elderly and the frail, any man hates the fact that someone sullies his wife's reputation or that of his immediate family. Yet, he, himself, shows very little regard for this when it involves other people's families. Given the opportunity, he will use various tricks and wiles in order to attain his goal. It is this propensity which is the true motive behind our hatred of fornication and our love of the *hijab*. Moreover, we, men, are not used to criticizing ourselves in such a harsh manner, and we are loath to recognize the legitimacy of this view, which is, in fact, the truth.[43]

Al-Haddad identified three points that make the *hijab* illegitimate. First, he argued that the *hijab*, which is the exclusion of women from public life, had built a barrier that prevented men and women freely choosing a spouse. It prevented men and women 'from seeing what they have in common and what is necessary in order to have a successful union'.[44] Al-Haddad pointed out that arranged marriages were often unsuccessful in Tunisian society. He further argued that non-arranged marriage does not 'automatically result in a successful marriage. However, … it provides man with some security and peace of mind.'[45]

Second, al-Haddad argued, the *hijab* had made men live contradictory lives. It allowed men to have two lifestyles: at home and outside the home. While, al-Haddad argued, women are denied access to public life, men enjoy a special lifestyle outside the home by spending money in cafés, bars and restaurants, drinking, gambling and other activities. At the same time women have been left with the responsibility for housework and childrearing.[46] Al-Haddad argued that men were 'only able to do so because they are the only ones who can impose the *hijab* on their wives, thus barring them from witnessing their dissolute lifestyle'.[47] For al-Haddad, this made a woman's destiny 'truly dreadful'.[48]

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[43] Al-Haddad, above n 8, 149.
[44] Ibid 149. For more explanation of this matter see ibid 121–36.
[45] Ibid 149.
[46] This could be seen as a parallel argument to Harriet Taylor Mill's in her *Enfranchisement of Women*. Taylor Mill wrote: '[N]umbers of women are wives and mothers only because there is no other career open to them, no other occupations for their feelings or their activities'. Lack of education on one hand and the perception that women are only qualified to be wives and mothers on the other excluded them from public life. Taylor Mill further wrote: '[T]o say that women must be excluded from active life because maternity disqualified them for it, is in fact to say, that every other career should be forbidden them in order that maternity may be their only resource.' Harriet Hardy Taylor Mill, *Enfranchisement of Women: An Essay by Mrs John Stuart Mill* (Women's Suffrage Association, 1868) 12.
[47] Al-Haddad, above n 8, 149.
[48] Ibid 149.

Third, as al-Haddad pointed out, the *hijab* prevented women from exercising their legal and civil rights by being able to control their financial affairs and property because these require going to court and meeting people in public. Therefore, women are at the mercy of their male guardians who sometimes abuse this authority.

On the basis of these points, al-Haddad suggested that removing the veil would have many benefits for women. Al-Haddad argued that unveiling, which is the uncovering of the face and enabling women to participate in public life, 'does not cause immorality; rather, it is the result of psychological factors we [men] cannot reasonably avoid talking about when discussing the removal the veil'.[49] Al-Haddad wrote:

> If we are sincere about pursuing the purity of women, we have to take issue with the dissolute behaviour of men, and avoid any instances of jealousy which break a woman's heart, and thus avoid fornication, homosexuality, polygamy, forced marriages and the fact that men can divorce their wives whenever they feel like it, without being accountable for it. There are also men who like to have several types of women and leave their families because they are not, or badly, prepared for marital life, or those who divorce their wives against the latter's wishes – sometimes even without their knowing it – for no reason other than to satisfy their lust. Consider the stupidity of the girls' guardians who have made a business out of marrying them off to anyone they wish. Unfortunately, there are plenty of men like these.[50]

In part one of al-Haddad's book, which discusses women's status in Sharia law, he deployed *ijtihad* to argue that polygamy should be abolished because it has no basis in Islam; 'rather, it is one of the evils of the pre-Islamic era which Islam has challenged through its gradualistic method'.[51] In his discussion of divorce, al-Haddad suggested that divorce must be finalized in the courts by either men or women. Therefore, he suggested that the state should establish specialized courts for divorce.[52] Furthermore, al-Haddad argued that equality between women and men could be achieved through a gradualist method, like the method taken by Islam on other issues such as slavery. Al-Haddad argued that, although the early era of Islam had not discouraged the slavery system because the slave trade was an important economic activity, it nonetheless encouraged freeing slaves as an expiation from sins. Al-Haddad argued, that the same methods could be applied to establish the equality of women. Al-Haddad wrote:

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[49] Ibid 152.
[50] Ibid.
[51] Ibid 63.
[52] Ibid 69–79.

There are other difficult issues that remained unresolved, such as the absolute authority of the husband in divorce and polygamy. However, in the same way as it was possible for Islam to abolish slavery based on its love of freedom, so too will it be possible over time to establish equality between man and woman in all things once the conditions for such evolution are fulfilled.[53]

Although al-Haddad's argument could be considered from a feminist perspective as conservative and patriarchal because it seeks women's rights inside the family and it does not challenge women's role as a mother and as part of her family and community, his argument was regarded by many religious scholars and some other people at that time as a blasphemy and heresy.

C.   Response from within

In the year following the publication of al-Haddad's book, Abduh Muhammed Murad, a religious scholar from the al-Zaytouna mosque-university, published his own book in response.[54] The book was titled *Mourning for al-Haddad's Woman or Response to the Wrong, Blasphemy, and Heresy Included in the Book of Our Woman in the Shar'ia and Society*.[55] The cover of the book suggests that the book does not express the opinion of Murad only. Rather, it was endorsed by four al-Zaytouna religious scholars. The al-Zaytouna religious establishment felt that it had a responsibility to criticize al-Haddad's book because al-Haddad had graduated from it. In the introduction to the book, Murad stated that al-Haddad had given Tunisian people a bad reputation because of his ignorance and the many wrong statements in his book.

Murad asserted that al-Haddad's book was not in favour of women. Rather, Murad argued, al-Haddad's intention was to destroy the pillars of Islam. As Murad pointed out, if al-Haddad really defended women, religious scholars would not think about criticizing and denouncing his book; instead, they would encourage him.[56] Murad pointed out that al-Haddad's book was neither Islamic nor atheistic. Rather, it was

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[53] Ibid 51.

[54] Al-Zaytouna mosque-university was the dominant religious educational institution, pre-Tunisian independence, that produced Islamic scholars and judges.

[55] Abduh Muhammed Murad, *al-Hiddad ala imra'at al-Haddad aw Rad al-Khatta wa al-Kufr wa al-Bida'ah allti hawaha Kitab Imra'tuna fi al-Sharia wa al-Mujtamaa* [Mourning for al-Haddad's Woman or Response to the Wrong, Blasphemy, and Heresy that were Included in the Book of Our Woman in the Shar'ia and Society] (Nahj Sooq al-Balat, 1931).

[56] Ibid 8.

written in a monk's style. What Murad meant by this is that al-Haddad's argument is subversive and aimed to destroy Islam.[57]

Murad also denied the legitimacy of al-Haddad practising *ijtihad* because, according to Murad, he could not be considered a *Mujtahid* (a person who practices *ijtihad*). Therefore, Murad criticized the authority of many of al-Haddad's arguments on topics such as polygamy, the freedom to choose a spouse and slavery. Murad came to the conclusion that al-Haddad wanted to corrupt Tunisian society because, Murad argued, al-Haddad denied the *hijab* because he wanted women to participate in public life and he tolerated sexual intercourse outside marriage.[58] Also, Murad opposed al-Haddad's arguments about slavery and argued that slavery in Islamic countries is different from that practiced in other countries because it is centrally about education. According to Murad, slaves are educated to be Muslims and treated as part of the family.

On the basis of Murad's book, al-Haddad's certificate from al-Zaitounah was withdrawn. Hence, he become unemployed and isolated from society until his death. Lilia Labidi writes that al-Tahir al-Haddad 'was marginalized and died in isolation only a few years after the publication of his book. He became a symbol for those who questioned the paternalist political discourse and took it upon themselves to construct a new discourse'.[59] Nevertheless, despite his isolation his thoughts were appreciated by some intellectuals and nationalists who then incorporated some of his ideas in the nationalist project. However, it took nearly twenty-five years for al-Haddad's argument to be adopted as a national project in the Tunisian Personal Status Code.

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[57] Ibid 11. Murad stated that al-Haddad had adopted the methods of Christian Protestants. Protestants in this context means the Protestant preachers who were in Tunisia at that time (who were probably missionaries). First, according to Murad, the Protestants tried to persuade ordinary people about their claims, especially young people, who did not have enough knowledge about Islam to respond. This population targeted by Protestants is the same population that al-Haddad chose in which to plant his corrupted ideas, Murad said. Second, Murad pointed out, al-Haddad followed the Protestants' methods by trying to criticize aspects of Prophet Muhammed's personal life. One of these critiques, according to Murad, is al-Haddad's argument that polygamy is not part of Islam. Rather, it was part of the life of the pre-Islamic period.

[58] Ibid 17. Unfortunately, there is no English translation of Murad's book and no sources in English discuss Murad's book. Murad pointed out that al-Haddad was not seeking to improve women's status. Rather, Murad stated that al-Haddad wanted to destroy the morality of society by demanding the participation of women in public life. For Murad, when women participate in public life, they will mix with men. This would lead to the corruption of Muslim society. Furthermore, for Murad, al-Haddad attempted to legalize *zina*. *Zina*, in Islamic jurisprudence, is any sexual intercourse between men and women outside marriage. Murad pointed out that what al-Haddad demanded was the abolition of punishment for committing *zina*. Ibid 9.

[59] Lilia Labidi, 'The Nature of Transnational Alliance in Women's Associations in the Maghreb: The Case of Aftrud and Atfed in Tunisia' (2007) 3(1) *Journal of Middle East Women's Studies* 6, 10.

According to Ida Lichter, al-Haddad's book 'presented the philosophical basis for the Code of Personal Status, proclaimed on August 13, 1956, under President Habib Bourguiba'.[60]

I have discussed al-Haddad because of his attempts to change the cultural background of women's status in Islam. As I have shown, al-Haddad relied on the concept of a gradualist approach to argue for an alternative story about women's status in Islamic contexts. He built his argument on the basis of re-interpreting theological texts and using them to support his main argument, concerning the possibility of promoting women's human rights in the Islamic context.

III. Using cultural tools to achieve legislative reform and the state's willingness to promote women's human rights

This part discusses the state's willingness to promote women's rights and status using cultural tools and values. The first section briefly discusses state feminism. The second section discusses the 1956 Tunisian Personal Status Code, and its relevance to al-Haddad's arguments. The third section discusses the Tunisian state's willingness to promote women's rights and status.

A. State feminism

According to Johanna Kantola and Joyce Outshoorn, 'State feminism can simply be defined as the advocacy of women's movement demands inside the state'.[61] However, the definition of state feminism is more complex than it seems to be.

First, the state is a complex term because it includes the entire government apparatus. It includes 'parliament, cabinets, and bureaucracies administrating programs for health, welfare, education, commerce, the judicial system, the army, and the police'.[62]

Second, the state is different from one country to another and it encompasses military dictatorships, capitalist democracies and socialist systems. On the basis of this, the relationship between the state and women is different from one state to another.

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[60] Ida Lichter, *Muslim Women Reformers: Inspiring Voices Against Oppression* (Prometheus Books, 2009) 339–40.

[61] Johanna Kantola and Joyce Outshoorn, 'Changing State Feminism' in Joyce Outshoorn and Johanna Kantola (eds), *Changing State Feminism* (Palgrave Macmillan, 2007) 1, 2.

[62] Hester Eisenstein, *Inside Agitators: Australian Femocrats and the State* (Temple University Press, 1996) xviii.

Broadly speaking, two different forms of state feminism can be identified:

(1) In the first form, state feminism can be considered as a combination of pressure from below to the top and top-down change. The women's movement creates the pressure from below to the top and the feminists in the state create the pressure for top-down change.[63] This is typically what state feminism means in the context of the Nordic, and some other Western, countries.[64]

(2) The second form of state feminism can be understood as 'the policies directed at women but imposed from above by male elites'. This form can be observed in the historical context of 'the former communist countries, the so-called Soviet bloc'.[65]

State feminism in Tunisia has taken the second form. In Tunisia, as Tunisian feminist Sana Ben Achour defines it, state feminism is 'the state's will to accelerate the process of equality between the sexes'. The term state feminism is used 'to distinguish between feminism as a social movement, driven by women's collective claim for equality and social change, and feminism as a doctrine and policy issued [solely] by the state'.[66] In this sense, Tunisia as an adopter of state feminism has been willing to promote women's human rights through a top-down strategy since its independence in 1956. This enabled the emergence of women's human rights organizations and feminist movements in Tunisia at a later stage. Such organizations and movements were approved by the state. Thus, there were feminist movements, which were sometimes secular, in Tunisia. But this led to the lack of an independent

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[63] This leads to a discussion of the role of femocrats. Hester Eisenstein argued that 'femocrat' has had two meanings at different times. In the 1970s, femocrat meant 'a feminist woman who had entered the public service bureaucracy to advance the cause of women and whose responsibilities were defined in this manner by the male bureaucrats or politicians who appointed her.' Ibid 68. So, a femocrat could be 'a woman's adviser at the state or federal level, or a member of a women's unit within some other government department, such as health and education'. Ibid 68. In the 1980s, the second meaning of femocrat emerged. It began to refer to 'powerful woman in government administration, with an ideological and political commitment to feminism'. Ibid 68. For Eisenstein, 'the femocrat experiment is a particularly developed example of state feminism'. Ibid xvii.
[64] Kantola and Outshoorn, above n 61, 2.
[65] Ibid.
[66] Quoted in Maaike Voorhoeve, 'Women's Rights in Tunisia and the Democratic Renegotiation of an Authoritarian Legacy' (2015) 5 *New Middle Eastern Studies* 1, 5.

feminist voice in Tunisia, which in turn marginalized many women's voices in the local discourse.[67]

This strategy did not lead to full legal equality or to true social change that enabled substantive equality.[68] This, in turn, maintained the status quo of women's rights in Tunisia. Maaike Voorhoeve notes that the 'Tunisian *status quo* in the field of women's rights is the result of state feminism of' Habib Bourguiba (who governed from 1956 to 1987) and his successor Zine al-Abdine Ben Ali (who governed from 1987 to 2011).[69]

However, although women's rights advocacy and the feminist movement in Tunisia were sponsored by the state, Tunisia is still considered the Arab country at the forefront of advancing women's human rights.[70] Katrin Bennhold points out that 'Tunisian women were among the first in the Arab world to obtain the right to vote'; also they 'secured abortion rights the same year U.S. women did and have a greater share of seats in Tunisia's Parliament than women have in the French Parliament'.[71] Pelin Gönül Şahin points out that, while Tunisia is part of a region in which women's rights are mainly defined by the state and the principles of religion, 'Tunisia was a country where gender legislation had undergone a wave of reforms, after the country's independence in 1956.'[72]

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[67] Kristine Goulding, *Discourses of Domination: Women's Political Rights, Human Rights Abuses and Strategic Politics of Public Legitimacy in Tunisia* (Masters Thesis, Lund University, 2010).
[68] Substantive or de facto equality in this chapter means that there is a social acceptance of the idea that women are equal to men despite their biological differences. Tunisian women face social and legal resistance to substantive equality. For example, in Tunisia the man is still considered the head of the family. In addition, there is still resistance to the social acceptance of single mothers. According to Maaike Voorhoeve, in 2011 one female member of the Ennhada Party – the Islamist party that won the majority of the votes after the Tunisian revolution in 2011 – 'unleashed a fierce polemic against single mothers, arguing that they were "women of easy virtue" who represented "a dishonor for Arabo-Islamic society". She proposed that all governmental support for these women should be abolished except in case of rape.' Voorhoeve, above n 66, 11.
[69] Ibid 5.
[70] Mounira Maya Charrad, 'Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation' (2007) 64 *Washington and Lee Law Review* 1513.
[71] Katrin Bennhold, 'Women's Rights a Strong Point in Tunisia', *The New York Times Online*, 22 February 2011 <http://www.nytimes.com/2011/02/23/world/middleeast/23iht-letter23.html?_r=0>.
[72] Pelin Gönül Şahin, 'Women's Liberties and Gender Equality in Tunisia: The Asthma of the Arab Spring?' (2013) 11(4) *Turkish Policy Quarterly* 161, 163.

B.   *Personal Status Code 1956*

The promulgation of the new Personal Status Code (PSC) on 13 August 1956 was a significant historical turning point in the history of women's human rights in Tunisia. According to Victoria Chambers and Clare Cummings, the PSC changed family law by transforming 'the legal construction of gender roles within the family and women's status'.[73] Mounira Charrad argues that the 1956 PSC challenged 'the model of kin-based patriarchy inherent in the Shari'a and present[ed] a new, nuclear model'.[74] The 1956 PSC, as Charrad argues, 'dropped the vision of family as an extended kinship group' and replaced it 'with the vision of a conjugal unit'.[75] In this sense, while the traditional nuclear model was built on strong ties 'crisscrossing a community of male relatives', the new nuclear model presented by the 1956 PSC is built on 'ties between spouses and between parents and children'.[76]

The Tunisian 1956 PSC abolished polygamy, and fixed the minimum age of marriage for women and men at 15 years and 18 years respectively. In addition, it abolished the old practice of repudiation of marriage and made it obligatory for divorce to take place in the courts.[77] As Charrad points out, the regulations on marriage increased 'women's potential autonomy from fathers and male kin'.[78] Making polygamy illegal also reduced the power of husbands. It was not only the 1956 PSC that promoted women's status in Tunisia. The Tunisian Constitution, proclaimed on 1 June 1959, treated women as full citizens.[79] According to the Tunisian combined initial and second reports submitted to the CEDAW Committee in 1993, the principle of equality was introduced into family law and enshrined in article 6 of the 1959 Tunisian Constitution, which stipulates that 'All citizens have equal rights and obligations, they

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[73] Victoria Chambers and Clare Cummings, *Building Momentum: Women's Empowerment in Tunisia* (Overseas Development Institute, 2014) 15.

[74] Mounira Maya Charrad, 'Policy Shifts: State, Islam, and Gender in Tunisia, 1930s–1990s' (1997) 4(2) *Social Politics* 284, 296.

[75] Ibid 295.

[76] Ibid.

[77] Before the 1956 Tunisian PSC, the husband had a right to divorce his wife by saying the word divorce. The PSC made this practice invalid because it provided that both spouses must go to court to get a divorce.

[78] Ibid.

[79] Michele Brandt and Jeffrey A Kaplan, 'The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia' (1995–1996) 12(12) *Journal of Law & Religion* 105, 128.

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are equal before the law'.[80] As the Tunisian initial report points out, from the time of Tunisian independence political reform was accompanied by social reform to ensure that Tunisian legislation conformed 'to the model of society decided upon by political choice, and by way of a sound interpretation of the respect of Islam in order to strengthen the country's independence'.[81] The Tunisian government aimed to strengthen the independence of the country at that time by 'reinstating the dignity of all citizens, to put an end to the era of repudiation, polygamy and confinement, and to establish mutual respect between husband and wife' for the sake of the children and the stability of the national community.[82] In supporting women's rights and making them a major part of the Tunisian national agenda, Tunisia declared 13 August a national paid holiday and named it 'Women's Day'.[83]

C.   State willingness to promote change

As I mentioned previously, the 1956 Tunisian Code of Personal Status benefitted from al-Haddad's arguments utilizing an approach similar to the 'background' aspect of the background-vernacularist methodology. As I have explained in Chapter 2, the deployment of religious tools through the notion of *ijtihad* is one important method of attempting to change the cultural background. The deployment of such tools had served to establish the legitimacy of the Tunisian state's willingness to promote women's rights through family law. It also served to situate the state's feminist agenda in the domestic discourse. The Tunisian feminist project at that time did not aim to vernacularize women's rights in order to achieve social change that would enable substantive equality. Rather, it used religious tools to promote legislative reforms in order to find a space to improve women's status and to counter the resistance of some religious establishments in Tunisia.

At that time, Tunisian elites had a strong intention of modernizing the state. One of the manifestations of modernization of the state for Tunisian political elites was the promotion of women's human rights. Thus, the promotion of women's human rights

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[80] Committee on the Elimination of Discrimination Against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention: Combined Initial and Second Reports of State Parties: Tunisia*, UN Doc CEDAW/C/TUN/1–2 (12 April 1994) [68].
[81] Ibid [69].
[82] Ibid.
[83] Ibid [70].

was not the national priority per se. The promotion of women's human rights in Tunisia was part of the project of secularization of the state.[84]

The utilization of something akin to the background-vernacularist approach, however, was not the only method that Tunisia used to promote women's human rights through family law. According to Mounira Charrad, the first post-independence president of Tunisia made efforts to weaken opposition to the new national agenda, which involved the secularization of the legal system and society.[85] He abolished religious courts, and nationalized the lands governed by religious establishments and tribes.[86] In her analysis of the shifts in gender policy in Tunisia, Charrad argues that the legislative reforms in the area of women's rights, including family law in the Arabic world, should be understood 'within the context of conflicts and alliance among key political actors and not simply as policy output generated by the state in response to pressure from below'.[87] Charrad defined these political actors as the officials and politicians who work in the government on the one hand, versus the social groups who have the upper hand, or the highest stakes in women's oppression, as Charrad identified them. Charrad argues that the social groups who have the upper hand in the oppression of women, at any given time, defend patriarchy by claiming that it is rooted in the traditions of Islamic law and that it represents the Sharia. She identified these groups as follows:

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[84] Habib Bourguiba wrote in the early 1930s in the newspaper he published: 'The Tunisia we want to free [from colonial rule] will be a Tunisia for neither Muslims, nor Jews, nor Christians. It will be the Tunisia of all who will want to take it as their mother country without distinction of religion or race.' Quoted in Mounira M Charrad, *States and Women's Rights: The Making of Postcolonial Tunisia, Algeria, and Morocco* (University of California Press, 2001) 208. For a discussion of secularism in Tunisia see Francesco Cavatorta and Rikke Hostrup Haugbolle, 'The End of Authoritarian Rule and the Mythology of Tunisia Under Ben Ali' (2012) 17(2) *Mediterranean Politics* 179, 189–91.

[85] Mounira M Charrad, 'Gender in the Middle East: Islam, State, Agency' (2011) 37(1) *Annual Review of Sociology* 417, 421.

[86] Mina Baliamoune, *The Making of Gender Equality in Tunisia and Implications for Development* (World Bank, 2012) <http://hdl.handle.net/10986/9228>.

[87] Charrad, 'Policy Shifts', above n 79, 311; see also, Mounira M Charrad, 'Contexts, Concepts and Contentions: Gender Legislation in the Middle East' (2007) 5(1) *Hawwa: Journal of Women of the Middle East and the Islamic World* 55; Mounira M Charrad, 'Kinship, Islam or Oil: Culprits of Gender Inequality?' (2009) 5(4) *Politics & Gender* 546; Charrad, 'Tunisia at the Forefront', above n 75; Mounira M Charrad, 'Women's Agency across Cultures: Conceptualizing Strengths and Boundaries' (2010) 33(6) *Women's Studies International Forum* 517; Mounira M Charrad, 'Central and Local Patrimonialism: State Building in Kin-Based Societies' (2011) 636(1) *Annals of the American Academy of Political and Social Science* 49.

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[a]) the Islamic establishment, b) regions with a predominance of tribal or kin groupings organized along the lines of the Shari'a, and c) political formations that define their identity in terms of a return to Islamic orthodoxy, such as Islamic fundamentalists.[88]

It can be understood from Charrad's argument that the progress of women's rights in Arabic countries, including Tunisia, was not due to pressure from below. Also, Arabic states and religious institutions have a long historical relationship, whether in the form of conflict or in the form of alliances. Charrad writes:

> When the state is in conflict with social groups … state actors are more likely to engage in policies that expand women's rights. Conversely, when the interests of the state encourage coalition with these groups, state actors are more likely to avoid any action that may jeopardize the coalitions, [sic.] They tend to promote policies that curtail women's rights.[89]

Charrad's argument shows that the main players in Arab countries, especially in Tunisia, are the government on one hand and the religious and traditionalist groups on the other. Therefore the discussion of women's rights or any human rights issue in Arab countries, including Tunisia, cannot be separated from the discussion of the relationship between the state and religious institutions or groups.[90] In this sense, Charrad suggests that the feminist mainstream in the Arab world, in Tunisia in particular, should look at this relationship seriously in order to have an opportunity to influence governments in the Arab world in favour of women's rights.

There are three lessons that could be drawn from the discussion of historical turning points in the progress of women's human rights in Tunisia. First, women's human rights can be promoted under authoritarian regimes. As Chambers and Cummings point out, the advantage of authoritarian regimes that have sympathy for women's human rights are that such regimes will not face strong opposition to legislating and

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[88] Charrad, 'Policy Shifts', above n 79, 311; see also, Charrad, 'Contexts, Concepts and Contentions', ibid; Charrad, 'Kinship, Islam or Oil', ibid; Charrad, 'Tunisia at the Forefront', above n 75; Charrad, 'Women's Agency across Cultures', ibid; Charrad, 'Central and Local Patrimonialism', ibid.

[89] Charrad, 'Policy Shifts', above n 79, 311.

[90] See generally, Tamir Moustafa, 'Conflict and Cooperation between the State and Religious Institutions in Contemporary Egypt' (2000) 32 *International Journal of Middle East Studies* 3; Tamir Moustafa, 'Law versus the State: The Judicialization of Politics in Egypt' (2003) 28 *Law and Social Inquiry* 883; Tamir Moustafa, 'The Islamist Trend in Egyptian Law' (2010) 3 *Politics and Religion* 610; Tamir Moustafa, 'Law in the Egyptian Revolt' (2011) 3 *Middle East Law and Governance* 181; Tamir Moustafa, 'Islamic Law, Women's Rights, and Popular Legal Consciousness in Malaysia' (2013) 38 *Law and Social Inquiry* 168; Tamir Moustafa, 'Liberal Rights versus Islamic Law? The Construction of a Binary in Malaysian Politics' (2013) 47 *Law & Society Review* 771; Tamir Moustafa, 'Judging in God's Name: State Power, Secularism, and the Politics of Islamic law in Malaysia' (2013) 3(1) *Oxford Journal of Law and Religion* 152; Tamir Moustafa, 'Law and Courts in Authoritarian Regimes' (2014) 10 *Annual Review of Law and Social Science* 281.

implementing gender equality.[91] Despite the fact that the authoritarian regime will not allow independent feminist voices to take a place in the local society, it will provide space 'for women to occupy decision-making roles in public and political office, and support for important policies and legislation'.[92] Second, 'top-down women-friendly reforms' can prepare the way to creating an environment that enables the development of feminist discourse and a feminist movement later. As I mentioned earlier in this chapter, the 1956 Tunisian PSC was not based on pressure from below or the feminist movement. Rather, it was based on the state's willingness to achieve modernization through promoting women's status in Tunisian society. However, the gendered legal reforms in the 1990s were based on feminist pressure and also the state's willingness to promote women's human rights.[93] Third, the deployment of cultural tools and values in Tunisia's early reforms played a crucial role in the stability of women's human rights in Tunisia.

IV.   Conclusion

This chapter has presented Tunisia as an example of an Arab country with a Muslim majority that utilized cultural tools and values through using the notion of *ijtihad* to promote women's human rights. This could be seen as a good example for the argument in Chapter 8, which discusses the importance of deploying traditional values to promote human rights norms and principles. This chapter has shown that the most progressive Personal Status Code in the Arab world regarding women's empowerment, if not in all the Muslim world, which was in Tunisia, would not have been enacted if it were not for two key points. First, the progressive Tunisian PSC would not be in effect if the state had not been willing to promote the rights of its citizens. Second, and relatedly, through its top-down strategy, Tunisia also developed a process that is can be considered as challenging the cultural background. It made efforts to change the cultural or religious background that determined the inferior status of women. As this chapter has shown, after its independence in 1956, Tunisia took a secular approach, which nonetheless relied on the changing background promoted through *ijtihad* of scholars such as al-Haddad and others.

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[91] Chambers and Cummings, above n 78, 45.
[92] Ibid.
[93] Charrad, 'Policy Shifts', above n 79.

The obvious explanation of how *ijtihad* is relevant to the background-vernacularist approach can be seen in the argument of al-Tahir al-Haddad discussed previously. This chapter presented al-Haddad's work because many women's human rights advocates and observers consider it the philosophical doctrine behind the 1956 Tunisian PSC.

On this basis, this chapter can draw two conclusions. First, the promotion of women's human rights is possible even under authoritarian regimes. In this sense, although liberal democracy is the political-legal system that best enables the promotion of women's human rights because it provides more space for humanitarian and feminist voices to be heard, the state's willingness (even if the state is authoritarian) can play a crucial role in promoting women's rights. Second, the promotion of women's human rights can be based on the deployment of cultural values. In the case of Tunisia, cultural tools and values, of which religious legal texts are a part, were deployed in a way that enabled the promotion of women's human rights. In this sense, such a process can be understood through the lens of the background-vernacularist approach.

The following chapter, Chapter 6, discusses the Egyptian and Tunisian reservations to CEDAW. It argues that becoming a state signatory enhanced the status of women to some extent in both countries. It shows that Egypt and Tunisia have made some progress in their efforts to comply with CEDAW, especially in their gradual withdrawal of some of their reservations to specified articles of CEDAW.

Chapter 6

Egypt and Tunisia's reservations to CEDAW

I.   Introduction

Chapter 4 discussed some of the turning points in the history of the Egyptian women's human rights movement, including the contribution of some religious scholars, who deployed cultural methods such as religious arguments to argue for promoting women's status in Egyptian society. This was followed by a discussion of the efforts of Egyptian feminists to develop arguments for women's right to access the public arena including the right to political participation and education. As Chapter 4 has shown, the development of the women's human rights movement in Egypt was accompanied by the state's willingness to promote certain aspects of women's human rights. Similarly, Chapter 5 discussed the state's willingness to promote women's status in Tunisia. The purpose of considering Tunisia was to show that women's rights can be promoted through the reform of Islamic law. The reform of Islamic law is actually the reform of some elements of the background of social meanings and cultural values that determine the inferior status of women. As chapters 4 and 5 have shown, the deployment of cultural tools, one of which is religious justifications for gender difference, enabled women's human rights to be promoted in the Egyptian and Tunisian contexts.

This chapter discusses Egyptian and Tunisian reservations to CEDAW. As I will show in this chapter, although some reservations to specific articles of CEDAW were made on the basis of the fear that CEDAW's provisions may conflict with Islamic Sharia, the later withdrawal of certain reservations was also based on the view that there was no conflict between the reserved articles and Islamic Sharia. This justification was only used after the Egyptian and Tunisian governments had made efforts to deploy cultural values, one of which is religious discourse, by encouraging particular cultural institutions to reconsider compliance with specific articles.

As I will show in this chapter, the Egyptian government through the Women's National Committee put pressure on Islamic Sharia professors and members of the Higher National Council before enacting Law No 1 of 2000, which gives women the right to initiate a divorce in the courts. This example shows how cultural values can

be deployed to promote human rights standards; this will be further considered in Chapter 8. In Tunisia, as discussed in Chapter 5, the promotion of women's rights was based on the state's willingness to promote gender legislative reforms through taking into account the cultural background of Tunisian society. I will elaborate further on this point in this chapter, and in Chapter 7.

This chapter is divided into three parts. Part II gives a summary of CEDAW. It briefly discusses the history of CEDAW and its articles. Furthermore, Part II includes a brief discussion of reservations to CEDAW in general with specific reference to Islamic states. Part II also includes a discussion of the reporting system, which can be considered an introduction to the next part of this chapter. The discussion of the reporting system gives a better understanding of how the CEDAW Committee works.

Part III is devoted to tracing the history of the Egyptian and Tunisian reports submitted to the CEDAW Committee. The purpose of this part is to trace the summary record of constructive dialogue between the CEDAW Committee and the Egyptian and Tunisian delegations regarding reservations to CEDAW.[1]

I focus on the CEDAW Committee's constructive dialogue for several reasons. First, the constructive dialogue clarifies the steps taken by both states parties toward compliance with CEDAW's provisions. The members of the CEDAW Committee frequently ask specific questions on issues raised in the national reports. Hence, the

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[1] I rely on summary records of constructive dialogue between the CEDAW Committee and the Egyptian and Tunisian delegations because there are no video records available online for these meetings before 2012. The previous United Nations High Commissioner for Human Rights (2008–2014), Navanethem Pillay, made many proposals to enhance the work of the human rights treaty bodies. One reform that she introduced was videoconferencing and webcasting. In a report published in 2012 Pillay writes:

> Treaty bodies have repeatedly requested the United Nations to provide webcasting services for all public meetings and videoconferencing technologies to facilitate their work and enhance their impact, including improved access, cooperation and participation.
> The experience of the Human Rights Council which has been webcast since 2006 on an ad-hoc basis has been widely acknowledged as being extremely positive both in terms of transparency and participation.
> The use of videoconferencing technologies could facilitate the participation of the different actors in all the steps of the reporting process and reduce related costs. In recent years, there has been an ever-increasing demand for the use of videoconferencing facilities by States parties during the sessions.

Navanethem Pillay, *Strengthening the United Nations Human Rights Treaty Body System: A Report by the United Nations High Commissioner for Human Rights* (June 2012) 88 <http://www2.ohchr.org/english/bodies/HRTD/docs/HCReportTBStrengthening.pdf>. This confirms that there were no recorded videos of constructive dialogue before 2012. I reviewed webcasts for CEDAW on the United Nations website and found that the first video was published online on 15 July 2013, which was for CEDAW's 55th session on Afghanistan.

states parties' representatives or delegations give specific answers, which in turn provide more clarification and explanation of what the state party attempts or intends to achieve. Second, the constructive dialogue of the CEDAW Committee does not rely only on the official reports submitted by the states parties. It also relies on the reports submitted by United Nations (UN) special agencies and non-governmental organizations, which will be discussed in Chapter 7. The constructive dialogue gives more explanation of the work of states parties and their efforts to comply with CEDAW than the official reports because it allows states to offer further explanation based on the committee's list of questions. Third, although all states parties are required by the reporting guidelines to highlight progress and the difficulties they face in implementing CEDAW, reviewing the constructive dialogue can provide a further explanation of whether or not there has been progress in both countries' approaches and how their explanations about the nature of the reservations and why they are still in place has changed over time.

Having considered the history of the constructive dialogue and concluding recommendations of the CEDAW Committee, Part III introduces a brief discussion of the reviews of Egyptian and Tunisian progress toward the withdrawal of their reservations to CEDAW.

It is worth noting that the reports examined in this chapter and Chapter 7, which discusses Egyptian and Tunisian compliance with article 5(a), predate the Arab Spring and that the issues that arose during the demonstrations in Egypt and Tunisia with respect to sexual harassment and treatment of women demonstrators will not be discussed in this thesis. These types of actions relate to the deep-seated cultural issues that I will be addressing in the context of article 5, which will be discussed in Chapter 7.

II.   A summary of CEDAW

The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) is considered the international Bill of Rights for women. It is considered the most important convention on women's status. The beginning of the establishment of CEDAW was in 1949, when the United Nations established the Commission on the

Status of Women (CSW) as a commission of the Economic and Social Council of the United Nations (ECOSOC).[2] The purpose of establishing the CSW was to make recommendations on any problem that related to discrimination against women, and to submit proposals on how these recommendations should be implemented.[3] Over the ten years between 1949 and 1959, the CSW drafted the following conventions: the Convention on the Political Rights of Women (20 December 1952); the Convention on the Nationality of Married Women (29 January 1957); and the Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriage (7 November 1962). Then, in its Resolution 1921 (XVIII), the UN General Assembly:

> 1. *Requests* the Economic and Social Council to invite the Commission on the Status of Women to prepare a draft declaration on the elimination of discrimination against women, with a view to its consideration by the General Assembly, if possible at its twentieth session;[4]

In 1965, the CSW proposed the Declaration on the Elimination of Discrimination against Women (DEDAW), which was adopted on 7 November 1967 by the General Committee.[5]

In the years following the adoption of DEDAW, the CSW discussed whether it would be possible to encourage countries to abide by the text of DEDAW by applying it in their local law.[6] The CSW submitted this idea to the Secretary General who handed the CSW's proposal to the member states. This resulted in the decision in 1974 to develop a comprehensive convention on the elimination of all forms of discrimination against women on a global scale.

CEDAW was adopted by the United Nations General Assembly on 18 December 1979. On 17 July 1980, 64 countries signed CEDAW and it came into force in

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[2] Darren Rosenblum, 'Unsex CEDAW, or What's Wrong with Women's Rights' (2011) 20 *Columbia Journal of Gender and Law* 98, 118.

[3] For more discussion of the history of women and development at the United Nations see Kristen Haack, 'Breaking Barriers? Women's Representation and Leadership at the United Nations' (2014) 20 *Global Governance* 37.

[4] *Draft Declaration on the Elimination of Discrimination against Women*, GA Res 1921 (XVIII), UN GAOR, 1274th plen mtg, UN Doc A/RES/1921 (XVIII) (5 December 1963).

[5] Article 1 declares that discrimination against women and denying their equality of rights with men 'is fundamentally unjust and constitutes an offence against human dignity': *Declaration on the Elimination of Discrimination against Women*, GA Res 22/2263, 22nd sess, 1597th plen mtg, Agenda Item 53, UN Doc A/RES/22/2263 (7 November 1967).

[6] Felice Gaer, 'Women, International Law and International Institutions: The Case of the United Nations' (2009) 32 *Women's Studies International Forum* 60, 61.

September 1981.[7] This took place, as Rebecca Cook points out, within 'two years of its adoption, faster than any previous human rights convention had come into force'.[8] Furthermore, CEDAW is one of ten human rights treaties that is ratified and monitored by a treaty body.[9] It has been described as the United Nations' 'landmark in the struggle for women's rights'.[10] The main purpose of CEDAW, as Christine Chinkin and Marsha Freeman point out, is the elimination of discrimination against women, in order to achieve women's equality with men.[11] However, CEDAW, as Chinkin and Freeman argue, focuses mainly on women. Therefore, CEDAW is not 'gender neutral' because it 'only prohibits discrimination against women'.[12]

CEDAW comprises an introduction and 30 articles. Its articles are frequently divided, as Elizabeth Sepper notes, 'into general principled articles from 1 to 5 and specific obligatory articles from 6 to 16'.[13] The CEDAW Committee has described articles 1

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[7] *Convention on the Elimination of All Forms of Discrimination against Women*, opened for signature 1 March 1980, 1249 UNTS 13 (entered into force 3 September 1981) ('CEDAW').

[8] Rebecca J Cook, 'Reservations to the Convention on the Elimination of All Forms of Discrimination against Women' (1990) 30 *Virginia Journal of International Law* 643, 643.

[9] The other human rights treaties are *International Covenant on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965, 660 UNTS 195 (entered into force 4 January 1969), *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976), *International Covenant on Economic, Social and Cultural Rights*, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1979), *Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment*, opened for signature 10 December 1984, 1465 UNTS 113 (entered into force 26 June 1987), *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990), *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, opened for signature 18 December 1990, 2220 UNTS 3 (entered into force 1 July 2003), *Convention on the Rights of Persons with Disabilities*, opened for signature 13 December 2006, 25/5 UNTS 3 (entered into force 3 May 2008), and *International Convention for the Protection of all Persons from Enforced Disappearance*, opened for signature 20 December 2006, 2716 UNTS 3 (entered into force 23 December 2010). See United Nations Human Rights: Office of the High Commissioner, *Human Rights Bodies* <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>; United Nations Treaty Collection <https://treaties.un.org/pages/UNTSOnline.aspx?id=2>. See also Anne F Bayefsky, 'Making Human Rights Treaties Work' in Louis Henkin and John Lawrence Hargrove (eds), *Human Rights: An Agenda for the Next Century* (American Society of International Law, 1994) 229.

[10] Marianne Heimbach-Steins, 'Human Rights – Whose Benefit? Critical Reflections on the Androcentric Structure of Human Rights and its Consequences on the Social Participation of Women' in Schweizerische Akademie der Geistes-und Sozialwissenschaften. Kolloquium (ed), *Universality, from Theory to Practice: An Intercultural and Interdiscplinary Debate about Facts, Possiblities, Lies and Myths: 25th Colloquium (2007) of the Swiss Academy of Humanities and Social Sciences* (Saint-Paul, 2009) 292, 232.

[11] Christine Chinkin and Marsha A Freeman, 'Introduction' in Marsha A Freeman, Christine Chinkin and Beate Rudolf (eds), *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary* (Oxford University Press, 2012) 2, 8.

[12] Ibid 9.

[13] Elizabeth Sepper, 'Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns Under the Women's Discrimination Treaty' (2008) 30(2) *University of Pennsylvania Journal of International Law* 585, 599; see also Andrew Byrnes, 'The Convention on the Elimination of All

to 5 and 24 as 'the general interpretive framework for all the Convention's substantive articles'.[14] Articles 6 to 16 spell out more specific obligations on the states parties in order to achieve the equality of women.[15] The rest of CEDAW's articles specify the establishment and rules of procedures of the CEDAW Committee (articles 17–22) and contain 'general clarifying and procedural clauses' (articles 23–30).[16] Article 5 will be discussed in Chapter 7.

A.   Reservations

This discussion of reservations is divided into two sections. The first section discusses the general idea of reservations. The second section discusses reservations to CEDAW.

1.   The general idea of reservations

Michael Buenger points out that contemporary treaty making is different from that prior to the late nineteenth century. At that time 'the process of constructing a treaty was rather linear and uncompromising, framed by the notion that unanimity, uniformity and full consent were key elements to legitimacy and enforceability'.[17] However, international human rights treaties can be treated as a special case: Marijke De Pauw points out that 'human rights treaties are of interest to State's citizens, not the State itself'.[18] De Pauw's discussion draws upon the declaration of the International Court of Justice (ICJ) in its 1951 Advisory Opinion of Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide.[19] This

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Forms of Discrimination against Women' in Wolfgang Benedek, Esther Mayambala Kisaakye and Gerd Oberleitner (eds), *The Human Rights of Women: International Instruments and African Experiences* (Zed Books, 2002) 120.

[14] Committee on the Elimination of Discrimination against Women, *General Recommendation No. 25, on Article 4, Paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on Temporary Measures*, 30th sess (2004) [6]; see also Sepper, above n 13, 601.

[15] Ibid.

[16] Julia Ernst, 'U.S. Ratification of the Convention on the Elimination of All Forms of Discrimination against Women' (1995) 3 *Michigan Journal of Gender and Law* 299, 305.

[17] Michael L Buenger, 'Human Rights Conventions and Reservations: An Examination of Critical Deficit in the CEDAW' (2014) 20 *Buffalo Human Rights Law Review* 67, 73.

[18] Marijke De Pauw, 'Women's Rights: From Bad to Worse? Assessing the Evolution of Incompatible Reservations to the CEDAW Convention' (2013) 29(77) *Merkourios – Gender in European and International Law* 51, 53. It should be noted that many commentators would not agree with this as it is states that negotiate, sign and ratify human rights treaties. The obligation falls on them to implement such treaties, so they would be of great interest to the state.

[19] It indicates that 'In such a convention the contracting States do not have any interests of their own … in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of

Advisory Opinion, as De Pauw points out, differentiated between human rights treaties and other international treaties. Drawing upon this Advisory Opinion that treated human rights treaties differently from other international treaties, as De Pauw argues, the ICJ made efforts to move away from the unanimity rule to a more flexible reservations system. This new and suitable system of reservations was codified in the 1969 Vienna Convention on the Law of Treaties ('Vienna Convention').[20] As Rebecca Cook points out, human rights treaties of this nature 'are distinguishable from historic international treaties of trade, commerce and territorial transfer, which tend to be bilateral and are contractually finite in nature'.[21] In this sense, as Cook points out, while the historic treaties created 'mutual privileges for states parties that are concluded in principle on a basis of reciprocity', multilateral human rights treaties 'have universal legislative effect in international law with obligations' for all.[22]

The Vienna Convention at article 2(1)(d) defines a reservation as 'a unilateral statement … made by a State, when signing, ratifying, accepting, approving or acceding to a treaty'. Article 19 of the Vienna Convention states that reservations can be made to any international treaty, unless the treaty prohibits reservations or provides that only specified reservations, which do not include the reservation in question, may be made.[23] If the treaty does not refer to these two conditions, according to the Vienna Convention article 19(c) the reservation should not be incompatible with the object and purpose of the treaty. Buenger points out that, while 'the first considerations concerning the validity of reservations rest on clear standards, the third consideration is more problematic'.[24] It is problematic because of the lack of standards that determine the legitimacy of such reservations. However, although incompatibility with the object and purpose of the convention could be ambiguous and difficult to

the maintenance of a perfect contractual balance between rights and duties': quoted in De Pauw, ibid 53.

[20] Ibid.

[21] Cook, 'Reservations to the Convention', above n 8, 645.

[22] Ibid.

[23] According to art 19 of the Vienna Convention, '[A] State may, when signing, ratifying, accepting, approving or acceding to a treaty, formulate a reservation unless:
 (a) The reservation is prohibited by the treaty;
 (b) The treaty provides that only specified reservations, which do not include the reservation in question, may be made; or
 (c) In cases not falling under sub-paragraphs (a) and (b), the reservation is incompatible with the object and purpose of the treaty.'
Vienna Convention on the Law of Treaties, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

[24] Buenger, above n 17, 74.

measure, some international law scholars have argued that this could be resolved by other states' acceptance of such reservations. As one international law scholar explained, 'the validity of a reservation depends solely on the acceptance of the reservation by another contracting State'; in this sense, article 19(c) is described as 'a mere doctrinal assertion, which may serve as a basis for guidance of States regarding acceptance of reservations, but no more than that'.[25] On this basis, when a state party to any international human rights treaty makes reservations upon its ratification of the treaty, another state party to the same treaty has the right to object to such reservations. In this sense, as Buenger points out, 'a reservation effectively becomes a reciprocal obligation in the negative; that is, as between a reserving state and an objecting state'.[26] Thus, the reservation does not mean that the state party is not obligated to make its domestic laws conform to the provisions of the treaty. Rather, it is 'to relieve other signatory states of the obligation to comply with a provision as between the two states that is otherwise operable between all non-objecting states'.[27] State parties to the treaty have 12 months to raise their objection to such reservations. However, such 'an objection does not preclude the entry into force of the treaty between the objecting and reserving State'.[28]

It is also worth mentioning that reservations can take the form of a reservation to specified articles, or a general reservation or declaration. For instance, a state party can make a general reservation clause to all articles of the convention that are not consistent with its Constitution.[29] State parties sometimes use a declaration to declare their policies or intentions, for instance, 'to declare acceptance of the competence of supervisory bodies to receive and examine petitions that allege violations of the rights affirmed in a convention'.[30]

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[25] Quoted in Alain Pellet, 'Convention of 1969' in Olivier Corten and Pierre Klein (eds), *The Vienna Conventions on the Law of Treaties: A Commentary, Volume 1* (Oxford University Press, 2011) 405, 425.
[26] Buenger, above n 17, 75.
[27] Ibid.
[28] De Pauw, above n 18, 53.
[29] Eric Neumayer, 'Qualified Ratification: Explaining Reservations to International Human Rights Treaties' (2007) 36 *Journal of Legal Studies* 397, 407.
[30] Lawrence J Leblanc, 'Reservations to the Convention on the Rights of the Child: A Macroscopic View of State Practices' (1996) 4 *International Journal of Children's Rights* 357, 361.

2. Reservations to CEDAW

Reservations to CEDAW are governed by the Vienna Convention on the Law of Treaties (1969). Some scholars of international law hold that there is uncertainty and confusion around such regulation.[31] CEDAW's article 28 states in paragraph 2 that a 'reservation incompatible with the object and purpose of the present Convention shall not be permitted'. Rebecca Cook comments that it seems that CEDAW has attracted more reservations than any other human rights convention.[32] It has been argued that Muslim countries often justify their reservations on the basis of cultural relativism,[33] asserting that certain articles of CEDAW conflict with the principles of Islamic law.[34] However, many scholars argue that Muslim countries utilize supposed Islamic principles (which may have nothing to do with Islam) when they make reservations to most human rights conventions, while they enter other conventions fully and without reservations.[35] In order to clarify ambiguities and possible contradictions between CEDAW and Islamic Sharia law, the United Nations Economic and Social Council

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[31] 'The role of reservations under the regime of international human rights conventional law highlights the constant tension between encouraging universal participation in a human rights convention and protecting the integrity of the convention': Cook, 'Reservations to the Convention', above n 8, 649; see also Belinda Clark, 'The Vienna Convention Reservations Regime and the Convention on Discrimination against Women' (1991) 85 *American Journal of International Law* 281; William W Cox, 'Reservations to Multipartite Conventions' in *Proceedings of the American Society of International Law*, forty-sixth annual meeting (1952) 26; R Edwards, 'Reservations to Treaties' (1989) 10(2) *Michigan Journal of International Law* 362; C G Fenwick, 'When is a Treaty not a Treaty?' (1952) 46(2) *American Journal of International Law* 296; G G Fitzmaurice, 'Reservations to Multilateral Conventions' (1953) 2(1) *International and Comparative Law Quarterly* 1; L Lijnzaad, *Reservations to UN Human Rights Treaties: Ratify and Ruin?* (Martinus Nijhoff, 1995).

[32] Cook, 'Reservations to the Convention', above n 8, 644.

[33] Rebecca J Cook, 'State Responsibility for Violations of Women's Human Rights' (1994) 7 *Harvard Human Rights Journal* 125, 126.

[34] Michele Brandt and Jeffrey A Kaplan, 'The Tension between Women's Rights and Religious Rights: Reservations to CEDAW by Egypt, Bangladesh and Tunisia' (1995–1996) 12 *Journal of Law & Religion* 105; Ann Elizabeth Mayer, 'Religious Reservations to the Convention on the Elimination of All Forms of Discrimination against Women: What do They Mean?' (2001) in Courtney W. Howland (ed.), *Religious Fundamentalisms and the Human Rights of Women* (Palgrave, 2001)105; Amira Sonbol el-Azhary, 'A Response to Muslim Countries' Reservations against Full Implementation of CEDAW' (2010) 8(3) *Hawwa* 348; Urfan Khaliq, 'Beyond the Veil? An Analysis of the Provisions of the Women's Convention in the Law as Stipulated in Shari'ah' (1995–1996) 2 *Buffalo Journal of International Law* 1; Rebecca J Cook (ed.), *National and International Perspectives* (University of Pennsylvania Press, 1994); C Chinkin, 'Reservations and Objections to the Convention on the Elimination of All Forms of Discriminations against Women' in J P Gardner (ed), *Human Rights as General Norms and State Rights to Opt Out* (Biicl, 1997) 64; J Connor, 'The Women's Convention in the Muslim World' in J P Gardner (ed), *Human Rights as General Norms and State Rights to Opt Out* (Biicl, 1997) 85.

[35] Ann Elizabeth Mayer, 'Islamic Reservations to Human Rights Conventions: A Critical Assessment' (1998) 15 *Recht van de Islam* 25; see also, Nisrine Abiad, *Sharia, Muslim States and International Human Rights Treaty Obligations: A Comparative Study* (British Institute of International and Comparative Law, 2008).

received a suggestion, in 1987, to 'promote or undertake studies on the status of women under Islamic laws' in order to enable the council to 'appraise more fully the effect of the reservations'.[36] The council, however, rejected this suggestion as a result of pressure exerted by Islamic states that saw this suggestion 'as being hostile to Islamic values'.[37]

Although Egypt and Tunisia, both Islamic states, entered reservations to CEDAW, a review of their reports submitted to the CEDAW Committee shows that both countries have reported progress in their compliance with CEDAW. This compliance can be seen in their gradual withdrawal of certain reservations to CEDAW and in the oral presentations of Egyptian and Tunisian representatives in their meetings with the CEDAW Committee. Although their progress in compliance with CEDAW is currently insufficient, it can be argued that during this process both Egypt and Tunisia's reports were scrutinized by the CEDAW Committee, and that the resultant constructive dialogue has had a positive influence on the Egyptian and Tunisian governments' perceptions of women's rights. Sally Engle Merry argues that, although CEDAW is a legal instrument that has no sanctions, the CEDAW Committee through the reporting system does 'important cultural work by articulating principles in a formal and public setting and demonstrating how they apply to countries under scrutiny'.[38]

The following sections of this chapter discuss Egypt's and Tunisia's reservations to CEDAW. Before discussing the reservations, this chapter briefly explains the reporting process. The purpose of this explanation is to show the crucial role played by the CEDAW Committee in promoting compliance with CEDAW and encouraging the states parties to withdraw their reservations to the convention. The committee does this by reviewing the periodic reports submitted by the states parties and the shadow reports submitted by non-governmental organizations, formulating a list of issues for countries that focus on particular aspects of the state parties' implementation of CEDAW and then entering into a dialogue when states parties

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[36] Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press, 2000) 102, 108; see also Clark, above n 31, 283–284; Catherine Logan Piper, 'Reservations to Multilateral Treaties: The Goal of Universality' (1985) 71(1) *Iowa Law Review* 285.
[37] Ibid 109.
[38] Sally Engle Merry, 'Constructing a Global Law – Violence against Women and the Human Rights System' (2003) *Law & Social Inquiry* 941, 941.

appear before the committee.[39] In addition the concluding observations of the committee often request that states consider withdrawing their reservations. All this will be discussed in the following section.

B.   The reporting process

As noted above, the CEDAW Committee carries out important cultural work. This is evident in the purpose of the reporting system as indicated in the *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties*, namely to enable the states parties to international human rights treaties to strengthen their commitment to respect and protect the rights stipulated in these treaties.[40] States parties to CEDAW are obliged under article 18 to submit reports to the CEDAW Committee.[41] Initial reports, which should be no more than 60 pages in length,[42] should be submitted within one year of ratification of CEDAW. Subsequent to this, states parties are obliged to submit periodic reports, which should not exceed 40 pages of sequentially numbered paragraphs,[43] to the CEDAW Committee at least every four years.[44]

In preparing their periodic reports, states parties are to take into account four points. First, states parties should take into account the general recommendations adopted by the CEDAW Committee.[45] States parties' reports should commence with the concluding observations ('Concerns' and 'Recommendations') of the previous report. States parties should also explain the barriers they faced in implementing the Convention.[46] Secondly, states parties should include general information on reservations and declarations in their reports. In the case of reservations to specific articles of CEDAW, especially to articles 2, 7, 9 or 16, or of general reservations that do not refer to a particular article, states parties are required to clarify and explain why they maintain these reservations. States parties are also required to mention any

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[39] Committee on the Elimination of Discrimination against Women, *Overview of the Current Working Methods of the Committee on the Elimination of Discrimination against Women: Note by the Secretariat*, 30th sess, UN Doc CEDAW/C/2004/I/4/Add.1 (12–30 January 2004).
[40] United Nations, *Compilation of Guidelines on the Form and Content of Reports to be Submitted by States Parties to the International Human Rights Treaties: Report of the Secretary-General*, UN Doc HRI/GEN/2/Rev.6 (3 June 2009) [1], [4] and [7].
[41] Ibid ch 5 [B.1].
[42] Ibid [J.1].
[43] Ibid [J.1].
[44] Ibid [B.1].
[45] Ibid [C.2].
[46] Ibid [E.3(a)].

reservation or declaration entered to other human rights treaties.[47] Thirdly, states parties are required to provide information on factors and difficulties that hinder implementation of the provisions of CEDAW. These factors and difficulties should be explained, along with steps that have been taken by the states parties to address and overcome them.[48] Finally, the periodic report 'should include specific data and statistics disaggregated by sex which are relevant to the implementation of each article of the Convention and the general recommendations'.[49] In addition, the CEDAW Committee may ask for an exceptional report if further explanation is required.[50] Periodic reports may also be required to be accompanied by annexes. Annexes are required if the states parties refer to certain specific articles of their legislative, judicial or administrative documents.[51]

When a state party submits its report, the CEDAW Committee considers the report in order to undertake 'constructive dialogue' with the state party's delegation. The purpose of this is 'to improve the implementation of the Convention by the States party'.[52] The CEDAW Committee compiles a list of issues and questions to be answered by the state party's delegation. The delegation is required to respond to this list three months in advance of the meeting held to consider the report.[53] The state party's delegation should be prepared for the items on this list and for additional questions. The delegation should include persons who are knowledgeable, and who from 'their position of authority or accountability, are able to explain all aspects of women's human rights in the reporting State and are able to respond to the Committee's questions and comments'.[54] After consideration of the report, the CEDAW Committee 'will adopt and publish its concluding observations on the report and the constructive dialogue with the delegation', which will be submitted to the General Assembly. The CEDAW Committee expects dissemination of the concluding observations in all appropriate languages by the state party.[55]

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[47] Ibid [C.3].
[48] Ibid [C.4].
[49] Ibid [C.5].
[50] Ibid [F.1].
[51] Ibid [G.1].
[52] Ibid [K.1].
[53] Ibid [K.2].
[54] Ibid [K.3].
[55] Ibid [K.4].

III.   Egyptian and Tunisian reservations to CEDAW

This part discusses Egyptian and Tunisian reservations to CEDAW. My purpose is to show that Egypt and Tunisia have made similar reservations to the same articles. However, paying close attention to the language deployed in the justifications for the reservations, it appears that Egypt and Tunisia have used different language, as will be discussed later in this chapter and in Chapter 7. This part also attempts to trace the history of the reports submitted to the CEDAW Committee by Egypt and Tunisia. The focus of my investigation of these reports will be the CEDAW Committee's discussion and recommendations in their meetings of constructive dialogue with the Egyptian and Tunisian delegations for the purpose of considering their reports.

I do not provide a comprehensive discussion of Egyptian and Tunisian reservations in the context of the background-vernacularist approach in this chapter. This will be attempted in Chapter 7. However, to contextualise my discussion of reservations, it might be helpful to foreshadow the question asked in Chapter 7 in order to understand to what extent Egypt and Tunisia have succeeded in challenging the cultural background and vernacularizing women's human rights norms. The following question is raised specifically for analysing the Egyptian and Tunisian reports, constructive dialogue with the CEDAW Committee, and shadow reports in Chapter 7:

- Was there any explicit information about the work the state has done to study how the cultural background of negative cultural norms and practices can be challenged or changed and replaced by human rights norms and principles?

Marsha Freeman argues that reservations specify areas 'in which status of women is of concern to the reserving State parties'.[56] For Freeman, reservations 'offer an opportunity for engagement by the CEDAW Committee and by civil society in a dialogue with the State on both the rationale and necessity of the reservations'.[57] Hence, as Freeman points out, through its review of periodical national reports of state parties in constructive dialogue, the CEDAW Committee attempts to re-examine

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[56] Marsha Freeman, *Reservations to CEDAW: An Analysis for UNICEF* (Gender, Rights and Civic Engagement Section, Division of Policy and Practice, UNICEF, 2009) 8 <http://www.unicef.org/gender/files/Reservations_to_CEDAW-an_Analysis_for_UNICEF.pdf>.
[57] Ibid.

'statutes, religious dictates, and customary practice'[58] in order to determine whether there is a possibility of a state party withdrawing its reservations. These strategies of re-examining statutes, religious dictates and customary practices comprise an examination of the cultural background that resists compliance with CEDAW, and are one dimension of what I have called a background-vernacularist approach. As discussed in Chapter 2 and as will be further discussed in chapters 7 and 8, history, religion, national law and culture make up the background of social meanings and cultural values. This background sometimes leads to resistance to the application of CEDAW, but also to the possibility of translating women's human rights norms into the local context. Therefore, through the questions highlighted above, we may be able to understand whether there is a clear reference to changing the cultural/religious background that paves the way for Egypt and Tunisia to withdraw their reservations to CEDAW.

A.   *Reservations to specific articles made by Egypt and Tunisia*

As mentioned above, Egypt and Tunisia have made effectively identical reservations to the same articles while employing different language. The main articles subject to Egyptian and Tunisian reservations are articles 9(2), 16 and 29. Article 9(2) states that 'States Parties shall grant women equal rights with men with respect to the nationality of their children.' Article 16 encourages states parties to ensure equal rights between men and women in the context of marriage and the dissolution of marriage. Article 29(1) states that any dispute between two or more states parties regarding the interpretation or application of CEDAW shall be submitted to arbitration.[59] If states parties do not reach agreement during arbitration, one of these parties could refer 'the dispute to the International Court of Justice by request in conformity with the Statute of the Court'.

Both Egypt and Tunisia have entered reservations to the articles listed above. However, while Egypt entered a general reservation to article 2, which encourages

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[58] Ibid.

[59] Article 29(2) and (3) give states parties the right to make a reservation (and many states parties to CEDAW made such reservations). I will not discuss this article further because it is irrelevant to my discussion. For states parties' reservations to CEDAW see Meetings of States Parties to the Convention on the Elimination of All Forms of Discrimination against Women, *Declarations, Reservations, Objections, and Notifications of Withdrawal of Reservations Relating to the Convention on the Elimination of All Forms of Discrimination against Women,* 16th mtg, item 6, UN Doc CEDAW/SP/2010/2 (1 March 2010).

states parties to eliminate discrimination against women through legislative reforms and appropriate measures, Tunisia entered a declaration regarding both CEDAW in general and article 15(4) in particular. Article 15(4) states that 'States Parties shall accord to men and women the same rights with regard to the law relating to the movement of persons and the freedom to choose their residence and domicile.'

The following section will discuss the Egyptian and Tunisian reservations in some detail, and will consider certain aspects of the discussions of the CEDAW Committee with the Egyptian and Tunisian representatives regarding these reservations in their meetings to consider the states parties' reports.

B.   *Egypt's reservations to CEDAW*

Egypt signed CEDAW on 16 July 1980 and ratified it on 18 September 1981.[60] At the time of its signing and ratification, Egypt made four reservations, to articles 2, 9(2), 16 and 29, as well as a general reservation to article 2.[61] The general reservation states that Egypt is willing to comply with this article only as far as 'such compliance does not run counter to the Islamic *Sharia*'.[62]

Egypt entered a reservation to article 9(2) in order to 'prevent a child's acquisition of two nationalities where his parents are of different nationalities, since this may be

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[60] Egypt signed CEDAW at the World Conference on the United Nations Decade for Women, Copenhagen, 1980. The ratification of CEDAW took place at the People's Assembly (Parliament) on 18 September 1982. See Committee on the Elimination of Discrimination against Women, *Second Periodic Reports of States Parties: Egypt*, UN Doc CEDAW/C/13/Add.2 (14 May 1987) pt 1 ('*Egypt's Second Report 1987*').

[61] Article 2 urges all states parties to CEDAW to make efforts to eliminate discrimination against women. This can be achieved, as article 2 suggests, by changing existing laws that discriminate against women and enacting new laws and policies. Chapter 8 will discuss article 2 in more detail.

[62] UN Women, *Convention on the Elimination of All Forms of Discrimination against Women: Declarations, Reservations and Objections to CEDAW [Egypt]* <http://www.un.org/womenwatch/daw/cedaw/reservations-country.htm>. ('*CEDAW Reservations Website*'). However, at the 164th meeting of the CEDAW Committee when it considered Egypt's second report, the Egyptian representative made this comment on article 2:

> 49. The law of the State was a unitary law. Islamic law, as such, was not followed in Egypt, although there were legal principles derived from Islam which governed personal status law for Muslims. Article 2 of the Convention was, on the whole, in conformity with Egyptian law, and the right to litigate was guaranteed to men and women on an equal footing. Discrimination was punishable by law …
>
> 50. Rights and responsibilities were of two kinds. In the case of general rights and responsibilities relating to political and economic life and the role of the citizen in society, no distinction was made on grounds of sex or religion under the Constitution and legislation. However, the rights and responsibilities of Muslims with regard to family law were governed by the rules of Islamic law and those of Copts by the Coptic Supreme Council.

Committee on the Elimination of Discrimination against Women, *Summary Record of the 164th Meeting: Consideration of Egypt's Second Periodic Report*, 9th sess, UN Doc CEDAW/C/SR.164 (5 February 1990) [49], [50].

prejudicial to his future'.[63] The Egyptian government considered that it was proper for the child to take 'his father's nationality [because] it is customary for a woman to agree, upon marrying an alien, that her children shall be of the father's nationality'.[64] Egypt held that 'this does not infringe upon the principle of equality between men and women'.[65] It is noteworthy that this reservation was not made on the basis of conflict with Sharia.

Egypt explained its reservation to article 16 on the basis of the financial outlays a husband is obliged make to his wife.[66] The Egyptian position was that according to Sharia law a husband pays dowry money and is responsible for financially maintaining his wife within the marriage. A husband must also make payment to his wife 'upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep'. In the Egyptian view the marital relationship is sacred.[67] This relationship is based on 'an equivalency of rights and duties'.[68] This concept of the natural marital relationship that is based on equivalent rights and duties guarantees 'true equality between spouses',[69] because it ensures their complementarity. On this basis, 'the *Sharia* therefore restricts the wife's rights to

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[63] Ibid.

[64] Ibid.

[65] Ibid.

[66] At the 39th meeting of the CEDAW Committee on 3 April 1984, when considering Egypt's initial report, many members of the committee asked for further explanation of 'the provisions of Islamic law and the consequences' of the Egyptian government's reservations regarding article 16 of CEDAW. One of the Egyptian representatives replied by explaining that marriage under Sharia law is a contract. This contract contains clauses which are agreed between the contracting parties before the marriage and are binding on both spouses. Those clauses stipulate that the husband has to provide for financial expenses and the wife does not have to do so if she does not wish to. As the Egyptian representative pointed out, such discrimination works in favour of women rather than against them because under that arrangement the wife is financially independent and has the right to spend her money freely. Committee on the Elimination of Discrimination against Women, *Summary Record of the 39th Meeting*, 3rd sess, UN Doc CEDAW/C/SR.39 (12 April 1984) [20]. (This summary record was originally written in Spanish.)

[67] In its initial report in 1983, at para 8(b), Egypt pointed out

the sacred character of marital relations in Egypt which is derived from firmly established religious tenets that cannot be violated, because it is considered that a complementarity between rights and duties which achieve real equality between the spouses is one of the most important foundations for marital relations, rather than the manifestations of formal equality which do not give the wife any useful interest to be obtained from the husband so much as they burden her with restrictions.

Committee on the Elimination of Discrimination against Women, *Initial Reports of State Parties: Arab Republic of Egypt*, 2nd sess, UN Doc CEDAW/C/5/Add.10 (3 February 1983) [8(b)] ('*Egypt's Initial Report 1983*').

[68] *CEDAW Reservations Website*.

[69] Ibid.

divorce by making it contingent on a judge's ruling, whereas no such restriction is laid down in the case of the husband'.[70]

With respect to article 29, Egypt stated that it does not 'consider itself bound by paragraph 1 of that article concerning the submission to an arbitral body of any dispute which may arise between States concerning the interpretation or application of the Convention'.[71] It is worth mentioning that Egypt has not entered reservations to article 29 on the basis of conflict with Islamic Sharia, and I will not discuss this article any further because it is irrelevant to my discussion.

1. Egypt's initial report (1984)

In its initial report, Egypt stated that the Constitution of Egypt 'provides for non-discrimination between citizens … [and] also provides for the State to ensure harmony between women's family duties, their activity in society and their equality with men [in all fields of life] without prejudice to the prescriptions of Islamic religious law'.[72] It is noteworthy that there were frequent references to Islamic Sharia in regard to non-discrimination and equality in the initial and second reports.[73] However, these references disappeared from subsequent Egyptian reports; namely the third report,[74] the combined fourth and fifth periodic reports,[75] and the combined sixth and seventh periodic reports.[76]

When the CEDAW Committee considered the initial Egyptian report in its 34th and 39th meetings, held on 30 March and 3 April 1984, the Egyptian representative in her introduction stated that 'there was no discrimination against women' in Egypt; she added that 'Egypt believed in equality between men and women, and considered that discrimination against women was a violation of the principles of respect for human dignity and an obstacle to the full development of the potentialities of women in the

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[70] Ibid.
[71] Ibid.
[72] *Egypt's Initial Report 1983* [1].
[73] *Egypt's Second Report 1987* [1].
[74] Committee on the Elimination of Discrimination against Women, *Third Periodic Reports of States Parties: Egypt*, UN Doc CEDAW/C/EGY/3 (25 July 1996).
[75] Committee on the Elimination of Discrimination against Women, *Combined Fourth and Fifth Periodic Reports of States Parties: Egypt*, UN Doc CEDAW/C/EGY/4–5 (30 March 2000).
[76] Committee on the Elimination of Discrimination against Women, *Combined Sixth and Seventh Periodic Reports of States Parties: Egypt*, UN Doc CEDAW/C/EGY/7 (5 September 2008).

service of their countries'.[77] As the Egyptian representative stated, 'Islam … attached great importance to the protection of women and guaranteed their rights and responsibilities as daughters, sisters, mothers and wives'.[78]

The Egyptian representative further stated that 'article 11 [of the Egyptian Constitution] assured proper co-ordination between the duties of women towards the family and their work in society, considering them equal with men in the fields of political, social, cultural, and economic life without prejudice to the prescriptions of Islamic law (Shari'a)'.[79] The Egyptian woman 'enjoyed from birth exactly the same legal rights as a man; in addition she kept her own patrimony and was free to administer her own finances and inheritances independently from her husband upon marriage'.[80]

In its comments on the Egyptian presentation, the CEDAW Committee indicated that the Egyptian report was the first that the committee had received from an Islamic country.[81] With respect to the reservations, one of the committee members indicated that the reservations made to articles 2 and 16 were incompatible with article 28 of CEDAW, which stipulates that a reservation is not permitted if it is incompatible with 'the object and purpose of the Convention'. The committee member questioned why these reservations were made to fundamental articles that laid down principles of equality.

With respect to article 16, the committee asked for further clarifications regarding 'the sacred character of marital relations, the issue of complementarity and the obligations of Islamic law on that subject'.[82] Some committee members asked if the concept of equality enshrined in article 2 was 'a formal legal concept and if there was any specific article in the Egyptian Constitution expressly forbidding discrimination against women'.[83]

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[77] Committee on the Elimination of Discrimination against Women, *The Committee Consideration of Initial Report*, 34th and 39th mtg, UN Doc CEDAW/C/5/Add.10 and Amend.1 [CEDAW/C/SR.34 and 39] (30 March and 3 April 1984) [182].
[78] Ibid [183].
[79] Ibid.
[80] Ibid [187].
[81] Ibid [189].
[82] Ibid [190].
[83] Ibid [193].

In her response to the committee on article 2, the Egyptian representative stated that 'under the Constitution all citizens were equal irrespective of their sex, origin, language, religion or belief'.[84] Regarding the comment on article 16 and the effects of Islamic religious law on it, the Egyptian representative explained that 'Islamic law had given a prominent position to all women and liberated them from any form of discrimination'.[85] She stated that article 16 'was fully compatible with Islamic law concerning the right to enter into marriage and the right to choose a spouse'.[86] It may be useful to note that there was no clear discussion of article 5 either in Egypt's initial report or in the committee meeting.

2.   Egypt's second report (1990)

At the CEDAW Committee's constructive dialogue meeting with Egyptian representatives regarding Egypt's second report, held on 31 January 1990, one of the Egyptian representatives stated that 'the legal concept of equality had to be seen within the framework of the economic and political scenario. Political systems might succeed in enacting laws that ensured equality, but the development of a society was based on the *de facto* situation'.[87] The Egyptian representative pointed out that 'Egypt had put much emphasis on legal equality' for women. He also 'adverted to the global tendency towards conservatism, in general, and admitted the existence of conservative groups also in Islamic countries'.[88]

In response to the CEDAW Committee's question about whether Egypt is considering withdrawing any of its reservations, the Egyptian representative stated that, as a sovereign state, Egypt has a right to enter reservations upon its ratification of any international legal instrument. He further argued that ratifying an international legal instrument with reservations is better than not becoming a state party to it at all. However, he also noted 'that there was a discussion among intellectuals and officials to reconsider the position regarding some of the reservations'.[89]

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[84] Ibid [214].
[85] Ibid [215].
[86] Ibid [216].
[87] Committee on the Elimination of Discrimination against Women, *Consideration of the Second Periodic Report of Egypt CEDAW/C/13/Add.2 and Amend.1*, UN Doc CEDAW/C/SR.164 and 165 (31 January 1990) [387].
[88] Ibid.
[89] Ibid [388].

In response to the CEDAW Committee's question regarding article 2 and the relationship between state law and Islamic law, the Egyptian representative stated that there is only one law in Egypt that governs all citizens. Regarding family law, however, Islamic law governs Muslims, whereas non-Muslims are governed by their own family law. In this sense, the reservations entered to CEDAW would not affect the application of article 2, as 'the Constitution guaranteed equality for all persons irrespective of sex or religion'.[90]

With respect to article 5, the Egyptian representative pointed out that 'educational curricula did not differentiate between women and men' because 'co-education was practiced at primary and university level'.[91] Non-governmental and governmental organizations, mass media and seminars, the Egyptian representative stated, had played a major role in that respect. One example of these efforts is that the National Commission for Women and the Ministry of Social Affairs had publicized information 'about recent legislation affecting women'.[92]

With respect to article 9, the Egyptian representative stated that 'there was a discussion to reconsider that reservation'.[93]

In relation to article 16, the Egyptian representative pointed out that entering a contract of marriage under Islam requires 'the free and full consent of the woman'.[94] The minimum age of marriage under Egyptian law, as the Egyptian representative stated, is 21 years. Regarding the custody of children, 'women had priority over men because according to Egyptian concept [sic.], women were more capable than men of taking care of children'.[95] Adoption of children, however, was forbidden under Egyptian law. Regarding the right of women to divorce, the Egyptian representative stated that under Islamic law women are free to insert a clause into the marriage contract to retain the option of a divorce, 'but that it was not a widespread practice'.[96]

In the light of the constructive dialogue above, the CEDAW Committee encouraged the Egyptian government to make an effort to withdraw its reservations to articles 2

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[90] Ibid [389].
[91] Ibid [391].
[92] Ibid.
[93] Ibid [394].
[94] Ibid [402].
[95] Ibid.
[96] Ibid.

and 9. Dual nationality is now allowed in Egypt, so the committee believed it would not be a problem for Egypt to withdraw its reservation to article 9 'in the light of this development'.[97]

Furthermore, the CEDAW Committee urged the Egyptian delegation to follow the committee's general guidelines and take into account comments made at the current session in the preparation of the subsequent periodic reports. Moreover, the CEDAW Committee noted that there was lack of progress on the part of the National Commission for Women; and there was a lack of interest among women to assert their rights and a lack of programs for the advancement of women.[98]

3.   Egypt's third and combined fourth and fifth periodic reports (2000)

In the Egyptian representative's opening speech to the CEDAW Committee meeting to consider Egypt's third and combined fourth and fifth periodic reports, she stated that, 'as a former member of the [CEDAW] Committee', she was pleased to see the improvement in the work of the CEDAW Committee.[99]

She stated that Egypt had made notable progress in implementing CEDAW. The most promising aspect of this progress, the Egyptian representative stated, was the establishment of the National Council for Women (NCW).[100]

The Egyptian representative stated that there was no conflict between Islamic Sharia and article 2 and the reservation should be withdrawn. However, she stated,

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[97] Ibid.

[98] Ibid [403].

[99] Engle Merry writes:

> There are sometimes previous connections between country delegations and the committee. For example, the chair of the Egyptian delegation was a former member of CEDAW. She had said that things had already changed since the early days (the early 1980s), when the committee was thought of as a group of women representing governments. In general, experts serve in addition to holding regular jobs and devote considerable time to their responsibilities, for which they receive expenses but little remuneration.

Merry, above n 38, 955. Merry wrote in a footnote that they are 'paid only $3000 a year for 8 weeks of meeting time and considerable time between meetings'. See also Pillay, above n 1, 75–77; Anne F Bayefsky, *The UN Human Rights Treaty System: Universality at the Cross-roads* (Transnational Publishers, 2001) 99.

[100] Committee on the Elimination of Discrimination against Women, *Consideration of Third Report and the Combined Fourth and Fifth Periodic Reports of Egypt*, 942nd and 493rd mtg, UN Doc CEDAW/C/EGY/4–5 (19 January 2001) [5].

withdrawal from this article may be emotive and would be controversial; nonetheless the NCW would continue to work towards withdrawal.[101]

The Egyptian delegation stated that articles 9(2) and 16 were still under consideration by the government committee that was established for the purpose of considering withdrawal from reservations.[102] Egypt had, however, made progress in granting women the right to ask for divorce.

As one member of the Egyptian delegation explained, in 2000 Egypt enacted Law No 1 that grants women what is called *khul*, which allows women to seek divorce through the courts. This law is considered to be the result of efforts made by the National Committee for Women, established in 1992.[103] This committee mainly focuses on the equal treatment of women and men in marriage contracts and the right of women to divorce. As the Egyptian representative explained it, the National Committee had pressured Islamic Sharia professors in religious institutions and members of the Higher National Council. This pressure can be understood as an effort by the Egyptian government to encourage such scholars to make more effort to re-interpret religious texts to challenge the cultural or religious background that constituted the inferior status of women in relation to divorce. As a result of this pressure and the challenge to the cultural background, Law No 1 was enacted.[104]

The CEDAW Committee praised the progress made by Egypt. However, one of the committee members expressed disappointment that progress in Egypt regarding the implementation of CEDAW was slow. She pointed out that events in Egypt are also important for the rest of the Islamic world.[105] In its concluding observations, the committee noted that, despite the equality of women and men being guaranteed by the Constitution, 'the persistence of patriarchal attitudes and stereotypical' behaviour regarding the role of women in the family and society 'limit the full implementation of the Convention'.[106] It recommended that Egypt should withdraw its reservations.

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[101] Ibid [8].
[102] Ibid [19].
[103] Ibid [17].
[104] Ibid.
[105] Ibid [30].
[106] Ibid [325].

4.   Egypt's combined sixth and seventh reports (2008)

In its 2008 report, Egypt declared that it would withdraw its reservation to article 9(2) concerning the equality of women with men in relation to the granting of nationality to women's offspring, due to 'the promulgation of Law No. 54 of 2004, which establishes such equality'.[107] The reservations to articles 2 and 16 remained, however, under consideration by the Egyptian government.

At the constructive dialogue meeting regarding the combined sixth and seventh Egyptian report in 2010, one of the committee experts raised a question concerning the reservation to article 2. She stated that in 2000 the Egyptian delegation 'indicated that a decision on the withdrawal of the reservations to article 2 of the Convention was imminent'.[108] She asked what progress had been made, noting that 'the law on *khul* enacted in 2000 had been described at the time as a major step towards withdrawal of the reservation to article 16'.[109] In response to this, one of the Egyptian representatives stated that she wished the reservation to article 2 would be withdrawn because the main barriers to this had been overcome. However 'the question of article 16 created delays in the discussion of article 2'[110] and, in her view, some provisions of article 16 would be problematic because they would 'grant women less rights than they currently enjoyed'.[111]

With respect to consistency between national law and the provisions of CEDAW, she stated that 'tax laws had been amended to recognize that women could be breadwinners, and women were now eligible for the appropriate tax exemptions'.[112]

In its concluding comments, the CEDAW Committee urged Egypt to review and withdraw its reservations to articles 2 and 16, as they 'are incompatible with the object and purpose of the Convention'.[113]

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[107] Committee on the Elimination of Discrimination against Women, *Combined Sixth and Seventh Periodic Reports of States Parties: Egypt*, UN Doc CEDAW/C/EGY/7 (5 September 2008) [11].
[108] Committee on the Elimination of Discrimination against Women, *Consideration of Combined Sixth and Seventh Reports of Egypt*, Summary record of the 918th meeting, UN Doc CEDAW/C/SR.918 (1 April 2010) [17].
[109] Ibid [18].
[110] Ibid [30].
[111] Ibid.
[112] Ibid [31].

5.   Egyptian national report submitted to the Human Rights Council in 2014

In 17 February 2010, Egypt underwent its first review under the universal periodic review mechanism.[114] This was during the seventh session of the Working Group on the Universal Periodic Review. The result of this periodic review was that Egypt received 165 recommendations. Egypt accepted 119, rejected 21, and responded to 25 recommendations.[115] This section focuses on selected recommendations concerning women's rights and Egypt's reservations. It also focuses on the Egyptian response to such recommendations.

The recommendations concerning women's human rights that Egypt partially accepted, and Egypt's responses, are as follows.

- Recommendation: withdraw reservations to articles 2 and 16 as well as ratifying the Optional Protocol to CEDAW (OP-CEDAW).[116] Response: Egypt agreed to review its reservations, especially article 2.[117] This means that it maintains its reservation to article 16, which will be explained later, and it does not intend to ratify the OP-CEDAW in the near future.[118]

- Recommendation: review legislation on personal status and the Penal Code to modify and delete articles that discriminate against women in order to achieve

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[113] Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women*, UN Doc CEDAW/C/EGY/CO/7 (5 February 2010) [14].

[114] Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/12: Egypt*, UN Doc A/HRC/WG.6/20/EGY/1 (22 July 2014) [1]. ('*Egyptian National Report Submitted to Human Rights Council 2014*').

[115] Ibid.

[116] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Egypt*, 28th sess, Agenda Item 6, UN Doc A/HRC/28/16 (24 December 2014) [166.14] (recommended by Slovenia). Similar recommendations were made by Ghana [166.15], Latvia [166.16] and Namibia [166.17] ('*Working Group on the Universal Periodic Review: Egypt 2014*').

[117] *Egypt Additional Information, Universal Periodic Review 2nd Cycle – Egypt* (5 November 2014) <http://www.ohchr.org/EN/HRBodies/UPR/Pages/EGSession20.aspx> ('*Egypt's Response to Working Group 2014*') (Egypt's response to the recommendations made by the Working Group, written in Arabic).

[118] It might be useful to mention that in the Egyptian national report written in English and Arabic, the report explained Egypt's reservation to article 16 by referring to article 17. Article 17 does not discuss women's rights in marriage. Thus, instead of referring to article 16, the Egyptian national report referred to article 17. Although Egypt had not made any reservations to article 17, in its national report submitted to the Human Rights Council, Egypt wrote: '14. Egypt will continue to maintain certain reservations to international human rights instruments, for example article 17 of the Convention on the Elimination of All Forms of Discrimination against Women ...' *Egyptian National Report Submitted to Human Rights Council 2014.*

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compliance with the Egyptian Constitution and international law. [119] Response: Egypt only agreed to review certain articles in personal status legislation and the Penal Code.[120]

- Recommendation: increase efforts to ensure gender equality and eliminate sexual and gender-based violence; taking legislative and enforcement measures to eliminate all forms of violence against women; and criminalizing domestic violence against women.[121] Response: Egypt accepted all these recommendations.[122]

In its national report submitted to the Human Rights Council in 2014, Egypt did not mention any progress towards withdrawing its reservations to articles 2 and 16,[123] and stated only that the government is still considering the matter. In its explanation of its decision to maintain the reservation to article 16, Egypt insisted, according to this report, that Egyptian legislation is based on Islamic law, and therefore the relationship between husband and wife is based on rights and duties. The report indicated that, although wives and husbands are not identical, they are complementary. On this basis, the Egyptian report argued that implementation of equality as stipulated in CEDAW would damage 'rights that women currently enjoy'.[124] In a footnote, it explained in Arabic how women according to Islamic Sharia benefit from the reservation, because the husband remains responsible for giving money to his wife (see the discussion of the initial report above).

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[119] *Working Group on the Universal Periodic Review: Egypt 2014* [166.18] (recommended by Sweden).
[120] *Egypt's Response to Working Group 2014* [4].
[121] *Working Group on the Universal Periodic Review: Egypt 2014*. The recommendations for eliminating violence against women were made by many countries: Rwanda [166.145], Singapore [166.147], Slovenia [166.148], South Africa [166.149], Sri Lanka [166.150], Sweden [166.151], Ukraine [166.152], United Kingdom of Great Britain and Northern Ireland [166.153], Afghanistan [166.154], Brazil [166.157], Central African Republic [166.156], Cote d'Ivoire [166.157], Democratic People's Republic of Korea [166.158], Estonia [166.159], France [166.160], Germany [166.161], Ghana [166.162], Iceland [166.163], Lithuania [166.164], Mali [166.165], Montenegro [166.166], and Pakistan [166.167].
[122] *Egypt's Response to Working Group 2014* [6], [7], [8].
[123] *Egyptian National Report Submitted to Human Rights Council 2014* [14].
[124] Ibid.

C. Tunisia's reservations to CEDAW

Tunisia signed CEDAW on 24 July 1980 and ratified it on 12 July 1985.[125] Tunisia made two declarations and three reservations, and entered a general declaration to CEDAW stating that Tunisia 'shall not take any organizational or legislative decision in conformity with the requirements of this Convention where such a decision would conflict with the provisions of Chapter I of the Tunisian Constitution'. Tunisia also made a declaration about article 15(4) to the effect that 'the right of women to choose their residence and domicile must not be interpreted in a manner which conflicts with the provisions of the Personal Status Code on this subject, as set forth in chapter 23 and 61 of the Code'.

In addition to these two declarations, Tunisia entered reservations to articles 9(2), 16(c), (f), (g) and (h), and 29(1). Tunisia stated that article 9(2) 'must not conflict with the provisions of chapter VI of the Tunisian Nationality Code'.[126] Tunisia stated that article 16 paragraphs (c), (d), (f), (g) and (h) 'must not conflict with the provisions of the Personal Status Code concerning the granting of family names to children and the acquisition of property through inheritance'. With regard to article 29(1), Tunisia stated that disputes between two or more states parties regarding the interpretation or application of CEDAW 'should be submitted for arbitration or consideration by the International Court of Justice only with the consent of all parties to the dispute'.

1. Tunisia's combined initial and second report (1994)

In its combined initial and second report, submitted in 1994, Tunisia noted that it was able to adopt many principles embedded in international human rights instruments, especially those of equal rights for men and women and non-discrimination, due to 'the great advances made in domestic law and Tunisian legislation since 1956, and the positive effect of the State's legislative reforms on equality between the sexes'.[127] The Tunisian report pointed out that it is 'true that there remain some specific legal situations in Tunisian law which differ from the concepts of equality stated in the

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[125] Committee on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention: Combined Initial and Second Reports of State Parties: Tunisia*, UN Doc CEDAW/C/TUN/1–2 (12 April 1994) [119].
[126] Ibid.
[127] Ibid [120].

Convention, and that this has led to the expression of reservations against some paragraphs of the Convention'.[128] These reservations would thus remain temporarily in force 'until the various provisions of the Convention can be fully integrated into existing Tunisian legislation'.[129]

One could infer from this that Tunisia intended to withdraw its reservations to CEDAW after enacting legislation incorporating the convention's provisions. The Tunisian report pointed out that it had established a national commission to review legal texts and domestic laws in order to achieve full compliance.[130]

Regarding article 5, the Tunisian report stated that, while 'the gains made by Tunisian women are a cause of pride for many Tunisians', it nevertheless remains a fact that the idea of emancipation of and equality of women faces resistance from within Tunisian society.[131] As the Tunisian report indicated, 'Tunisia has since its independence adopted a policy aiming to modify mentalities and eliminate stereotypes and prejudices against women'. In other words, Tunisia claims to have explicitly focused on challenging the cultural background in its efforts to comply with CEDAW. The main channels that the Tunisian government used to achieve that were education and information.[132] As the Tunisian report indicated, the legal and social measures so far adopted 'to favour women and the family are conducive to implanting the concept of equality between men and women in minds and mentalities'.[133]

At the second constructive dialogue meeting to consider Tunisia's combined initial and second periodic reports, held on 26 January 1995, the Tunisian representative stated that Tunisia had ratified CEDAW in 1985 in a socio-political 'context marked by the rise of fundamentalism'.[134] The rise of fundamentalism is thus a factor in Tunisia's reservations to CEDAW. In her response to a comment by a member of the committee who questioned the cruel treatment of Islamists and their families by the Tunisian government, the Tunisian representative stated that a democratic society must defend itself against terrorists who deny women's rights and freedom of

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[128] Ibid [121].
[129] Ibid [122].
[130] Ibid [192].
[131] Ibid [195].
[132] Ibid [196].
[133] Ibid [197].
[134] Committee on the Elimination of Discrimination against Women, *Summary Record of the 273rd Meeting*, 14th sess, UN Doc CEDAW/C/SR.273 (16 February 1995) [11].

conscience. Shadow reports, as a committee member pointed out, however, indicated that the Tunisian government had harassed human rights activists and infringed upon their freedom of speech.[135]

Furthermore, the Tunisian representative stated that success in Tunisian women's emancipation was due 'in part to the adoption of the Personal Status Code which had laid the groundwork for a new family structure based on legal equality'.[136] With respect to article 15, the Tunisian representative stated that the freedom of women to choose their residence and domicile is limited because it conflicts with child protection concerns.[137]

2. Tunisia's combined third and fourth periodic reports (2002)

When considering Tunisia's combined third and fourth periodic reports in 2002, the CEDAW Committee praised Tunisia for 'adopting creative and effective methods of empowering women, in particular for introducing reforms into Shariah law'.[138] The CEDAW Committee praised Tunisia for its strong political will 'on the part of the Government to implement the Convention through the Constitution, laws and programmes'.[139] It did, however, note that Tunisia's reservations to CEDAW had not yet been withdrawn.[140] One of the committee's members pointed out that the additional amendments 'to the Personal Status Code would, for instance, make it possible for Tunisia to withdraw its reservations to article 16'.[141]

A Tunisian delegate stated in response to these comments that it was 'no exaggeration to say that the new generation of Tunisians were the most liberated in the Muslim world'.[142] A Tunisian representative stated that Tunisia took seriously its obligation to achieve full compliance with CEDAW. She stated that the approach that Tunisia had taken combined enacting legislation enshrining women's rights and establishing an

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[135] Ibid [9].
[136] Ibid [10].
[137] Ibid [32].
[138] Committee on the Elimination of Discrimination against Women, *Summary Record of the 565th Meeting: Combined Third and Fourth Periodic Reports of Tunisia*, UN Doc CEDAW/C/SR.565 (24 December 2002) [15].
[139] Ibid [9].
[140] Ibid [12], [13].
[141] Ibid [16].
[142] Ibid [20].

'institutional framework to translate the enjoyment of those rights into action'.[143] The main ministry responsible for this is the Ministry for Women and Family Affairs. As the Tunisian representative stated, the work of this ministry relies on three other bodies: the National Council for Women and the Family, the Centre for Research, Documentation and Information on Women (CREDIF), and the National Women and Development Commission. The ministry had designed a communications strategy to develop 'the translation into action of women's rights, with a focus on changing attitudes'. Here it can be argued that Tunisia had focused on altering the cultural background of Tunisians' attitudes toward women's equality. This, the Tunisian representative stated, 'would be able to pave the way for withdrawal of the country's reservations to the Convention'.[144]

The Tunisian representative stated that this strategy had three aims. The first was to give women's rights 'better visibility'.[145] For example, Tunisia celebrates National Women's Day (13 August), International Rural Women's Day, the International Day of the Family, and the Day of the Family. The second aim of the strategy was 'to spread a culture of human rights', targeting in particular families and young people. The third aim was 'to combat sexist stereotypes, particularly in the media'.[146]

The committee praised the progress that Tunisia had achieved, although it seemed less than fully satisfied. In its concluding comments the CEDAW Committee urged Tunisia 'to expedite the steps necessary for the withdrawal of its reservations'.[147] It was additionally concerned about 'the remaining discriminatory provisions, especially in the nationality and the Personal Status Code'.[148] It urged Tunisia 'to continue the process of legislative reform and review relevant existing laws in consultation with women's groups'.[149]

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[143] Ibid [23].
[144] Ibid.
[145] Ibid.
[146] Ibid.
[147] UN General Assembly Official Records, 57th sess, Supp No 38 (A/57/38) UN Doc A/57/38 (2002) [189].
[148] Ibid [191].
[149] Ibid.

3.   Tunisia's combined fifth and sixth reports (2010)

In its meeting to consider Tunisia's combined fifth and sixth periodic reports in 2010, the CEDAW Committee raised similar concerns about the general declaration and reservations that Tunisia had made to CEDAW. The committee was concerned about compatibility between these reservations and article 28 of CEDAW, which disallows reservations if they are incompatible with the object and purpose of the convention.[150]

A committee member stated that Tunisia had ratified some human rights instruments without reservations, such as the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. The committee member pointed out that 'both instruments contained provisions on equality and non-discrimination', and enquired whether 'it could be assumed that the reservations to the Convention would shortly be withdrawn'.[151]

Another committee member, however, expressed doubt concerning the progress of women's rights in Tunisia and the implementation of CEDAW. She asked how Tunisia's reservation to article 16(c) 'affected the enforcement of the Convention through the courts and what impact the reservation' might have.[152]

Another committee member enquired why Tunisia retained reservations to key areas of the convention, namely those regarding nationality and the family, and further enquired about the role of religion and its influence in Tunisia in the interpretation of law. The member also mentioned that in its report Tunisia had stated that non-governmental organizations (NGOs) played a crucial role. The committee, however, 'had received reports that a number of NGOs had encountered obstacles in carrying out their work'.[153]

In response to these comments, a Tunisian representative stated that the reservations were still under government consideration, although some obstacles still remained, one of these being that a number 'of the principles contained in the Convention

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[150] Committee on the Elimination of Discrimination against Women, *Summary Record of the 949th Meeting: Combined Fifth and Sixth Periodic Reports of the Republic of Tunisia*, UN Doc CEDAW/C/SR.949 (15 October 2010) [11].
[151] Ibid.
[152] Ibid [12].
[153] Ibid [13].

appeared to be incompatible with the precepts of Islam and the Koran'.[154] Efforts were therefore being undertaken to 'encourage a more nuanced interpretation of religious texts'.[155] It should be noted that this statement is an acknowledgement of the possibility of using *ijtihad*.

In its concluding comments, the CEDAW Committee pointed out that Tunisia retained its reservations and its general declaration to the CEDAW. It noted that in 2008 Tunisia withdrew its reservations to articles of the Convention on the Rights of the Child that were similar to CEDAW's articles relating to marriage, the rights of inheritance and nationality.[156] It urged Tunisia to withdraw its general declaration and reservations to the CEDAW because, as the committee stated, 'they may no longer be necessary in the light of recent legislative developments and of the delegation's assurance that there is no contradiction in substance between the Convention and Islamic law'.[157] This withdrawal should be accompanied, the committee stated, with 'appropriate awareness-raising measures so as to counteract the "ideological block" identified by the State party'.[158]

4.   **Tunisia's national report submitted to the Human Rights Council in 2012**

In its national report submitted to the Human Rights Council in 2012, Tunisia stated that it had decided to withdraw its reservations to CEDAW in 2011.[159] Pursuant 'to statute no. 103/2011 (24 October 2011), Tunisia resolved to agree to withdraw the reservations to CEDAW, in order to strengthen gender equality further'.[160] In the report of the Working Group on the Universal Periodic Review in 2012, many member states' delegations welcomed the step taken by Tunisia to withdraw all its reservations to CEDAW.[161]

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[154] Ibid.
[155] Ibid [17].
[156] Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Tunisia*, UN Doc CEDAW/C/TUN/CO/6 (5 November 2010) [12].
[157] Ibid [13].
[158] Ibid.
[159] Human Rights Council, *National Report Submitted in Accordance with Paragraph 5 of the Annex to Human Rights Council Resolution 16/21: Tunisia*, UN Doc A/HRC/WG.6/13/TUN/1 (30 March 2012) [17] ('*National Report to Human Rights Council: Tunisia 2012*').
[160] Ibid [109].
[161] Human Rights Council, *Report of the Working Group on the Universal Periodic Review: Tunisia*, 21st sess, Agenda Item 6, UN Doc A/HRC/21/5 (9 July 2012) ('*Working Group: Tunisia 2012*') Poland

In the report of the Working Group on the Universal Periodic Review, Tunisia stated that the National Constitutional Assembly would uphold its international obligations with regard to respect of human rights and gender equality.[162] Religious and cultural authorities in Tunisia would not undermine Tunisia's international obligations under human rights instruments.[163] It further stated that Tunisia's 'Law No. 55 of 2010 had amended provisions of the Tunisian Nationality Code to allow Tunisian women married to a foreigner to pass their nationality to their children in the same way as men'.[164]

The working group made many recommendations to Tunisia. The following recommendations, according to the report of the working group, enjoy the support of Tunisia, which means it did not make any response except to accept them:

- Developing a comprehensive strategy to 'eliminate patriarchal attitudes and negative stereotypes of women in the Tunisian society … in conformity with articles 2(f) and 5(a) of CEDAW'.[165]
- Ensuring the principle of equality between men and women by formulating it clearly in the new Constitution 'and apply it in practice through concrete measures'.[166]
- In order to uphold women's rights, Tunisia should integrate the Personal Status Law into its new Constitution.[167]
- In order to reduce the phenomenon of violence against women, Tunisia should continue its cooperation with civil society organizations.[168]
- Taking measures necessary to achieve the full participation of woman in the political, social and economic fields as well as in decision making in all fields in public life.[169]
- Adopting the concept of discrimination 'in line with CEDAW for the definition of fundamental rights related to gender equality'.[170]

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[13], Portugal [14], the Republic of Korea [16], Slovenia [22], South Africa [23], Spain [24], Togo [29], Uruguay [35], Australia [48], Congo [60], Costa Rica [61], Cote d'Ivoire [62], the Czech Republic [64].

[162] *Ibid* [42].

[163] *National Report to Human Rights Council: Tunisia 2012* [109].

[164] Ibid [86].

[165] *Working Group: Tunisia 2012*, recommended by Uruguay [114.1]. Thailand made a similar recommendation and it also recommended that Tunisia protect media pluralism, freedom of speech, and access to information and education [114.2].

[166] This was recommended by Switzerland and a similar recommendation was made by Botswana. Ibid [114.3]. The Netherlands also made a similar recommendation, and it added that Tunisia should 'include legislation on measures to eliminate all forms of violence against women' [114.4].

[167] This was recommended by Germany. Ibid [114.5].

[168] This was recommended by Jordan. Ibid [114.7].

[169] Ibid [114.9]. This was recommended by Egypt, Greece and Oman.

There were also some recommendations regarding the Personal Status Code, which recommended that Tunisia should 'resolve the issue of discrimination against women with regard to legal status', especially in marriage, child custody and guardianship.[171]

D.   Discussion

The absence of a comprehensive strategy for compliance with article 5, a point which will be discussed further in Chapter 7, makes it difficult to interpret Egyptian and Tunisian withdrawal of reservations to CEDAW articles using the background-vernacularist framework (or at all). In other words, it is difficult to provide a clear explanation of the withdrawal of reservations made by Egypt and Tunisia by reference to the idea of changing the background of negative cultural norms or the idea of vernacularizing CEDAW's norms and principles. It is not easy to state that Egypt withdrew its reservation to article 9 (2) of CEDAW because of a change in the background of a cultural norm or because Egypt vernacularized specific norms and principles of CEDAW in order to enable compliance. The same observation can be made in relation to Tunisia. It is not easy to determine what elements of the background of cultural norms had been changed or which of CEDAW's norms had been vernacularized, and therefore what in general was different that led Tunisia to withdraw its reservations to CEDAW.

The main ambiguity raised in these reports flows from the absence of a clear discussion of the cultural background forming the resistance to full compliance with CEDAW. Cultural background is mentioned in the reports, but not fully discussed, and nor is a strategy for changing it identified. The absence of a clear strategy for compliance with article 5 (a), which will be discussed further in Chapter 7, makes any discussion of how Egypt and Tunisia managed to withdraw their reservations through dealing with cultural barriers difficult. There is insufficient evidence in the reports to draw conclusions about knowledge of, and strategies for changing, the cultural background.

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[170] Ibid [114.10]. This was recommended by Honduras.
[171] Ibid [114.14]. This was recommended by Kyrgyzstan.

For this reason, I would simply like to highlight the main points mentioned in the above discussion that relate to my understanding of how the background-vernacularist approach could in the future be deployed as a theoretical framework for analysis.

1. 'Non-foundational foundation'

As I have shown, it seems that both Egypt and Tunisia had asserted the 'non-foundational foundation' of noncompliance between Islamic Sharia and some of CEDAW's core articles. In other words, both states asserted that there was no foundational or absolute inconsistency between Sharia and CEDAW. This means that Islamic founadtions were not such that they could never be consistent with CEDAW. The Egyptian representative highlighted this in 2000, as mentioned before, when she stated that 'Islamic Shari'a has no conflict with article 2 and the reservation should be withdrawn'.[172] However, the Egyptian representative mentioned that withdrawal may be emotive and controversial for many Egyptian people. Here, it seems that the problem is not the conflict with Islamic Sharia because there is no foundational foundation for such a conflict with article 2. The problem is how to persuade people that there is no conflict between Islamic Sharia and the achievement of women's equality.

Similarly, Tunisia clearly asserted a 'non-foundational foundation' for its reservations. In the meeting to consider its combined initial and second report in 1994, the Tunisian representative stated that the reservations made by Tunisia would remain temporarily in force 'until the various provisions of the convention can be fully integrated into existing Tunisian legislation'. It can be understood from this statement that Tunisia made reservations to some articles of CEDAW in order to take time to modify its laws and prepare for social change. Hence, the reservations made by Tunisia were not purely based on religious grounds. As I discussed in Chapter 5, Tunisia had deployed religious discourse and tools to promote women's rights. The main motivation for the reservations, as mentioned by the Tunisian representative, was that Tunisia had taken its socio-political context into account, where fundamentalism had emerged in Tunisian society before Tunisia become a state party to CEDAW.

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[172] I discussed article 2 in Chapter 1 and I will discuss it further in Chapter 8.

From the discussion above, it appears that Egypt and Tunisia made their reservations strategically. This means that both Egypt and Tunisia had a political willingness to comply with CEDAW. But, they made reservations so that they could take their time to prepare the way for full compliance with CEDAW.

2. The necessity of challenging the cultural background

The necessity of challenging the cultural background as a method for enabling compliance with CEDAW and withdrawing reservations was addressed more fully by Tunisia than by Egypt. As shown previously, Tunisia mentioned in 1994 that since its independence it had adopted policies that aim to 'modify mentalities and eliminate stereotypes and prejudice against women'. In 2002, the CEDAW Committee praised Tunisia for 'adopting creative methods of empowering women'. This was based on deploying religious tools 'for introducing reforms into Shari'a law'. As I will further discuss in Chapter 7, Tunisia referred to the religious and cultural context in relation to the enhancement of women's status more often than Egypt did.

In contrast, in Egypt's reports and the summary record of constructive dialogue meetings between the CEDAW Committee and the Egyptian delegations, there was less reference to the need to challenge the cultural background. Despite this fact, in 2000 the National Committee for Women put pressure on Islamic Sharia professors and religious institutions to re-interpret key religious texts in order to grant women the right to divorce. This pressure resulted in Law No 1 of 2000, which grants Egyptian women *khul*, which gives women a right to ask for a divorce in court. It could be argued that this law was based on changing the religious background that prevented women from being able to initiate a divorce.

Nevertheless, it appears that the political will to comply with CEDAW is stronger in Tunisia than in Egypt. Tunisia's progressive approach to women's human rights in Islamic jurisprudence enabled it to challenge the cultural background of the inferior status of women in Islamic jurisprudence. As chapters 2 and 5 point out, the differentiation between Islam as a spiritual practice or set of religious duties and Islamic jurisprudence as a law should be made clearly in order to challenge the cultural background. This differentiation was made by Tunisian religious scholar al-Tahir al-Haddad, when he argued for the promotion of women's status in Tunisia in the 1930s, as discussed in Chapter 5. This differentiation is crucial because it suggests

that many rules of Islamic family law should not be conceived as fixed and unchangeable. Therefore, it asserts the 'non-foundational foundation' of the inferiority of women in Islamic teachings. As Chapter 2 points out, treating Islam as a system of belief and Islamic jurisprudence as the same thing makes the task of human rights advocacy difficult.

IV.   Conclusion

Three conclusions can be drawn from the discussion in this chapter. Firstly, I have shown that both Egypt and Tunisia have entered reservations to virtually the same articles on the basis of similar justifications. However, while Egypt made reservations to these articles by openly declaring its fear of conflict with Islamic Sharia, Tunisia justified its reservations less directly. For example, when Tunisia made reservations to certain articles of CEDAW, it did not state that these articles are incompatible with Islamic Sharia. Instead, it declared that these articles should not be incompatible with the provisions of Chapter I of the Tunisian Constitution and the provisions of the Tunisian Code of Personal Status. One of the provisions of Chapter I of the Tunisian Constitution is article 1, which states that 'Tunisia is a free, independent and sovereign state. Its religion is Islam, its language is Arabic, and its form of government is a republic.'[173] Thus, instead of declaring in its reservations that the articles are incompatible with Islamic Sharia, Tunisia referred to the authority of its own constitution. Highlighting this point aids considerably in understanding the careful language that the Tunisian representatives used in their meetings with the CEDAW Committee.

Secondly, and relatedly, as I have shown, both Egypt and Tunisia have made progress in compliance with CEDAW, especially in their withdrawal of certain reservations and declarations. This progress can be seen in their legislative reforms in favour of women's human rights undertaken in order to comply with certain articles to which they had entered reservations. For example, while Egypt withdrew its reservation to article 9(2) and recently considered withdrawing its reservation to article 2, Tunisia has withdrawn all its reservations to CEDAW. In addition, Tunisia has promised that, as mentioned above in Tunisia's report submitted to the Human Rights Council in

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[173] *Tunisian Constitution*, Chap I art 1.

2012, it will not allow its obligations under international human rights instruments to be undermined by religious or cultural authorities.

Finally, this chapter can be considered an introduction to Chapter 7, which is devoted to discussion of Egyptian and Tunisian compliance with article 5(a). Also, the discussion of the gradual withdrawal of Egypt and Tunisia's reservations can be considered a supporting argument for the crucial role that the willingness of the state can play in achieving compliance with CEDAW. In other words, this material demonstrates the importance of a politico-legal approach, in addition to a socio-cultural approach. In this sense, it could be argued that Tunisia's deployment of cultural values and tools, including religious tools and justifications, enabled it to promote women's human rights in Tunisian law; and to announce confidently that it withdraws all its reservations to CEDAW; and confidently to announce that no religious or cultural authorities will undermine its obligations under international human rights conventions. To explore this matter in more depth, Chapter 7 will focus on Egyptian and Tunisian compliance with article 5(a).

This chapter concludes that, although Egypt and Tunisia deployed Islamic justifications to support their reservations to some articles of CEDAW, such justifications should not be considered as a challenge per se. This is because Egypt and Tunisia also deployed (different) Islamic justifications to reform their laws so that they could withdraw some of their reservations to CEDAW. Through the lens of the background-vernacularist approach, Egypt and Tunisia have made some efforts to promote change in the cultural background by strategically deploying religious tools and discourse. It appears that both Egypt and Tunisia faced cultural barriers to implementing CEDAW. There is no clear comprehensive strategy for overcoming such obstacles, as will be shown in Chapter 7.

Chapter 7

Egypt and Tunisia's compliance with CEDAW article 5(a)

I.   Introduction

Chapter 6 discussed the Egyptian and Tunisian reservations to CEDAW and showed that there has been some progress in their compliance with CEDAW. In particular they have gradually withdrawn their reservations to certain articles. Although this progress was not as rapid as expected because it occurred years after Egypt and Tunisia ratified CEDAW, such progress allows room for optimism. The optimistic view is that it is possible for Egypt and Tunisia to comply with CEDAW because the withdrawal of specific reservations was based on the deployment of cultural tools and values as well as the use of legal means to promote women's rights. These were both necessary because women's human rights is the point of intersection between the political, legal, religious and socio-cultural fields.

The main article of CEDAW that promotes cultural change to enable the legal and substantive equality of women is article 5(a). This chapter discusses Egyptian and Tunisian compliance with article 5(a). The chapter is divided into three parts, after this introduction. Part II discusses article 5 of CEDAW. The main focus of this part is article 5(a) because it concerns social change. Article 5(b), which encourages states parties to change the roles of women and men inside the family by sharing the responsibility for raising children and housework, is also significant, but not as central to this thesis and therefore I do not consider it in detail. Part III discusses the recent reports by Egypt and Tunisia. The main focus of this part is the efforts made by Egypt and Tunisia to comply with article 5(a). It attempts to show that the main obstacles to compliance that Egypt and Tunisia face are cultural. Therefore, it attempts to show that Egypt and Tunisia have not yet developed a comprehensive strategy to ensure compliance with article 5(a), as the CEDAW Committee noted in its concluding observations on Egypt and Tunisia's reports. In addition, Part III discusses the important role that non-governmental organizations (NGOs) play in facilitating the work of the CEDAW Committee, especially in its concluding observations and

recommendations.[1] Furthermore, this part takes note of some issues raised by the shadow reports regarding Egypt and Tunisia's most recent national reports, in 2008 and 2009, and introduces the CEDAW Committee's concluding observations and recommendations.

Part IV discusses the 'socio-cultural' and 'politico-legal' approaches to generating change. This part attempts to show that, although the strategy that this thesis suggests could be considered mainly a socio-cultural approach, such an approach will not be effective if it is not accompanied by the state's willingness to protect human rights, which is embodied in a politico-legal approach. In other words, both strategies are essential and complement each other. I introduce these approaches in order to enable us to look closely at what compliance with article 5(a) requires by giving a brief discussion of the Egyptian and Tunisian reports.

This chapter concludes that, because culture plays a crucial role in gender equality and Egypt and Tunisia still do not have a comprehensive strategy for compliance with article 5(a), the background-vernacularist approach could be a suitable theoretical framework to help them achieve compliance. As discussed in this thesis, the background-vernacularist approach is about promoting change in the cultural background and vernacularizing human rights norms and principles.

II. Article 5(a) of CEDAW

As Chapter 1 and 6 indicated, CEDAW is the most important human rights convention that focuses on protecting and promoting women's human rights. CEDAW suggests that, in order to achieve legal and substantive equality, states parties should work on both legal reforms and cultural change. Dianne Otto notes that paragraph 14 of CEDAW's introduction lays the groundwork of the convention,[2] as it recognizes that achieving full gender equality requires 'a change in the traditional role

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[1] It should be noted that NGOs do not formulate the concluding observations and recommendations. Committee members do this. NGOs supply information that is used by the committee to ask more in-depth questions (putting together the list of issues for the country to address) and the information they provide probably influences the conclusions and recommendations, as I discussed in Chapter 6 and as I will address in this chapter.

[2] Dianne Otto, 'International Human Rights Law: Towards Rethinking Sex/Gender Dualism' in Margaret Davies and Vanessa E Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory* (Ashgate, 2013) 197, 204.

of men as well as the role of women in society and the family'.[3] On this basis, Otto points out that the 'need to promote social change is framed as a legal obligation in article 5(a)'.[4] However, Otto indicates that 'there has been surprisingly little feminist focus on the CEDAW article 5(a)'.[5]

Article 5(a) provides that:

> States Parties shall take all appropriate measures: (a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

Elizabeth Sepper indicates that article 5(a) has two roles: an interpretive and a substantive role.[6] In its interpretive role, it requires states parties to look beyond legislative reforms in order to achieve cultural change. In its substantive role, it looks at areas that have not been covered by the other provisions of CEDAW.[7]

The importance of article 5(a) derives from the crucial role that culture plays in establishing women's human rights in the context of state and society. The CEDAW Committee thus recognized that, despite the efforts states parties have made to achieve legal equality for women, 'true advancement towards equality requires fundamental social and cultural change'.[8] At its sixth session in 1987, the CEDAW Committee adopted *General Recommendation No 3* concerning article 5. It states that the consideration of 34 reports from states parties since 1983 showed 'the existence of stereotyped conceptions of women, owing to socio-cultural factors, that perpetuate discrimination based on sex and hinder the implementation of article 5 of the convention'.[9] Rebecca Cook and Simone Cusack define the term 'stereotype' as 'a generalized view or preconception of attributes or characteristics possessed by, or the

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[3] CEDAW introduction para 14.
[4] Otto, above n 2, 204.
[5] Ibid.
[6] Elizabeth Sepper, 'Confronting the "Sacred and Unchangeable": The Obligation to Modify Cultural Patterns Under the Women's Discrimination Treaty' (2008) 30(2) *University of Pennsylvania Journal of International Law* 585, 599.
[7] Ibid 597.
[8] Division for the Advancement of Women, Department of Economic and Social Affairs, *Assessing the Status of Women: A Guide to Reporting Under the Convention on the Elimination of All Forms of Discrimination against Women* (United Nations, 2000) 17.
[9] Committee on the Elimination of Discrimination against Women, *General Recommendation No 3 on Education and Public Information Programmes*, 6th sess (1987).

roles that are or should be performed by, members of a particular group'.[10] Cook and Cusack point out that gender stereotypes are 'concerned with the social and cultural construction of men and women, due to their different physical, biological, sexual, and social functions'.[11] Gender stereotyping, as Cook and Cusack indicate, is not problematic itself. It becomes problematic when it operates to deny the fundamental freedoms and human rights of individuals by creating 'gender hierarchies' and ignoring the 'characteristics, abilities, needs, wishes, and circumstances' of particular individuals in law and society.[12]

Thus, in order to eliminate stereotypes about women the committee in its *General Recommendation No 3* 'urges all States Parties effectively to adopt education and public information programmes, which will help eliminate prejudices and current practices that hinder the full operation of the principle of social equality of women'.[13]

Furthermore, at its 11th session in 1992, the CEDAW Committee adopted *General Recommendation No 19*, concerning violence against women.[14] The committee stated that 'gender–based violence is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men'.[15] In its comments on articles 5, 2(f) and 10(c), the committee stated that:

> Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry death, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.[16]

In addition to articles 2(f), 5 and 10(c), in its *General Recommendation No 19* concerning violence against women, the committee commented on articles 6, 11, 12, 14 and 16. In light of these comments, the committee advocated the adoption of

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[10] Rebecca J Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives* (University of Pennsylvania Press, 2010) 9; see also Sophia R Moreau, 'The Wrongs of Unequal Treatment' (2004) 54 *University of Toronto Law Journal* 291.
[11] Ibid 20.
[12] Ibid.
[13] Committee on the Elimination of Discrimination against Women, *General Recommendation No 3 on Education and Public Information Programmes*, 6th sess (1987).
[14] Committee on the Elimination of Discrimination against Women, *General Recommendation No 19 on Violence against Women*, 11th sess (1992).
[15] Ibid [1].
[16] Ibid [11].

specific recommendations. One of these recommendations is that states parties should take appropriate and effective measures 'to ensure that the media respect and promote respect for women'.[17]

At its 16th session in 1997, the committee formulated *General Recommendation No 23* concerning article 7 regarding women's participation in political and public life.[18] It urged states parties to enable women to participate in non-governmental organizations and associations, and drew attention to the definition of discrimination against women stipulated in article 1 of CEDAW, which is as follows:

> [a]ny distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[19]

The committee pointed out that the distinction drawn between public and private spheres of activity has reinforced the notion of women's inferiority, as 'women have been assigned to the private or domestic sphere, associated with reproduction and the raising of children, and in all societies these activities have been treated as inferior'.[20] The committee further commented:

> 10. In all nations, the most significant factors inhibiting women's ability to participate in public life have been the cultural framework of the values and religious beliefs … cultural traditions and religious beliefs have played a part in confining women to the private sphere of activity and excluding them from active participation in public life.

> 12. Stereotyping, including that perpetrated by the media, confines women in political life to issues such as the environment, children and health, and excludes them from responsibility for finance, budgetary control and conflict resolution. The low involvement of women in the professions from which politicians are recruited can create another obstacle. In countries where women leaders do assume power this can be the result of the influence of their fathers, husbands or male relatives rather than electoral success in their own right.[21]

The committee comprehensively discussed article 7, and made many recommendations about facilitating achievement of women's rights in political and public life. One of these recommendations urges the states parties to take appropriate

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[17] Ibid.
[18] Committee on the Elimination of Discrimination against Women, *General Recommendation No 23 on Violence against Women*, 16th sess (1997).
[19] Ibid [3].
[20] Ibid [8].
[21] Ibid [10], [11], [12].

measures to overcome barriers to equality 'including those resulting from illiteracy, language, poverty and impediments to women's freedom of movement'.[22]

The CEDAW Committee refers to culture for its interpretation of the majority of CEDAW's articles. As Sepper indicates, 'Article 5(a) gives the Committee the flexibility to interpret CEDAW in an evolutionary way, identifying negative patterns and stereotypes as they emerge'.[23] Therefore, article 5 of CEDAW can be considered, as Felipe Isa points out, 'one of the more radical portions of CEDAW'.[24]

III.   Egyptian and Tunisian reports regarding article 5: the elimination of stereotypical patterns

This part discusses the latest reports from Egypt (in 2008) and Tunisia (in 2009), primarily focusing on Egyptian and Tunisian compliance with article 5(a). As discussed previously, article 5(a) focuses on the elimination of stereotypical representations of women and is thus one of the most important articles in CEDAW. The CEDAW Committee has used it as an interpretive tool for its evaluation of states parties' compliance with other articles of CEDAW. This section discusses the efforts made by Egypt and Tunisia to comply with article 5(a) detailed in their latest reports, and pays close attention to the CEDAW Committee's concluding observations and comments, and its constructive dialogue sessions with Egyptian and Tunisian representatives.

The discussion in this part views these reports and comments through the lens of the background-vernacularist approach. I will discuss the Egyptian and Tunisian reports through asking the following question:

- Was there any explicit information about the work the state has done to study how the cultural background of negative cultural norms and practices can be challenged or changed and replaced by human rights norms and principles?

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[22] Ibid [45(c)].
[23] Sepper, above n 6, 609.
[24] Felipe Gomez Isa, 'The Optional Protocol for the Convention on the Elimination of All Forms of Discrimination against Women: Strengthening the Protection Mechanisms of Women's Human Rights' (2003) 20(2) *Arizona Journal of International and Comparative Law* 291, 301.

This question may enable us to understand whether states parties' national reports demonstrated an in-depth understanding of the social and cultural factors affecting women.

A. The 2008 Egyptian report

In the context of article 5, Egypt's combined sixth and seventh periodic report stated that state policies supported the elimination of negative cultural forms through a campaign of awareness raising, directed through channels including the Ministry of Education, the Ministry of Culture, and the Ministry of Information.[25] Additionally, it stated that many governmental and non-governmental organizations had made efforts to 'counteract negative cultural baggage and to eliminate practices and customs that marginalize women's role in society'.[26]

According to the Egyptian report, governmental and non-governmental agencies worked together in order to 'change the social behaviour patterns of men and women, e.g., through media channels that broadcast numerous programmes designed to eliminate negative practices involving gender chauvinism'.[27] The Egyptian report stated that, despite the efforts made towards changing negative practices against women, there remain challenges. The main challenge facing the Egyptian government is the persistence of male chauvinism in rural and remote communities.[28]

The Egyptian government stated that it had a plan for future efforts to challenge male chauvinism. This plan includes training programs for 'employees in the various awareness-raising organizations (media, educational, and cultural organizations)'.[29] This training will focus on advanced concepts for refuting social and cultural patterns and negative practices that constitute the disadvantageous position of women in society. The plan attempts to strengthen the efforts of NGOs and the National Council for Women (NCW) to 'monitor media programmes, educational curricula, and cultural programmes directed at society; and the counteracting of anything conducive to gender chauvinism or the entrenchment of negative stereotypes of women in the

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[25] Committee on the Elimination of Discrimination against Women, *Combined Sixth and Seventh Periodic Reports of States Parties: Egypt,* UN Doc CEDAW/C/EGY/7 (5 September 2008) 21.
[26] Ibid.
[27] Ibid 23.
[28] Ibid.
[29] Ibid.

family and society'. Moreover, the Egyptian government has a plan to make sure that family education provides the appropriate understanding of maternity as a social function and joint responsibility between women and men in 'upbringing and development of their children'.[30]

The Egyptian government stated, however, that it continued to face challenges in this matter. The first challenge delineated was that some Egyptian families 'still do not understand the notion of joint responsibility for childbearing'.[31] They still believe that the responsibility for rearing children is 'cast primarily upon the women'. The second challenge noted was that around '1/5 of Egyptian families [are] supported by women. These families require more programmes to help female heading households bear their responsibilities.' The third challenge was that discrimination 'in childbearing is a primary element of discrimination against women'.[32]

The Egyptian report pointed out that 'Egypt's early childhood policies, programmes, and projects are inadequate and fall short of the desired goals'. Future efforts planned by Egypt's government included offering educational and training programs in order to educate society on the 'importance of understanding the parents' shared social responsibility for child-rearing'.[33]

Examining this report through the lens of the background-vernacularist approach, we can state that it did not contain explicit information about how Egypt dealt with the cultural background that resists compliance with article 5(a). The report shows insufficient understanding of the cultural background that maintains the status quo of the inferior status of women. This was because that the report simply contained no clear discussion about the strategies needed to achieve cultural change.

It could be argued that the Egyptian report discusses article 5(a) using purely secular language and ignoring the religious elements of the cultural background that need to be challenged. The Egyptian report identified male chauvinism as one of the main cultural barriers that the Egyptian government faced in promoting compliance with article 5(a), but did not discuss how to alter the culture to reduce chauvinism. As I

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[30] Ibid.
[31] Ibid 24.
[32] Ibid.
[33] Ibid.

discussed in Chapter 1, women's human rights issues can be considered the crossing point between the political, legal, religious and socio-cultural fields. In this sense, if one claims that the inferior status of women is merely a result of male chauvinism, this means that the religious-cultural and politico-legal dimensions have been overlooked. It might be true that male chauvinism can be considered one cultural barrier. However, it might be better if the Egyptian report identified the cultural or religious background that constructs and supports male chauvinism. In other words, male chauvinism is the effect of deeper cultural and religious foundations, and these foundations need to be understood and addressed if chauvinism is to be reduced. There was no clear discussion of this in the Egyptian report.

In the following section I examine the shadow reports which addressed some problems faced Egyptian women. Here it will become clearer that the term male chauvinism may not totally explain the cultural barriers to implementation of article 5(a). The difficulties that women face in getting a divorce, violence against women, and sexual harassment, for example, cannot be explained merely by the concept of male chauvinism.

1.   Egypt's shadow reports

The second shadow report submitted by the Egyptian Association for Community Participation Enhancement (EACPE) in 2009 indicated many areas of disadvantage faced by women in Egypt. The EACPE's shadow report indicated that, although progress has been made in promoting Egyptian women's status, Egyptian women still suffer from discrimination and violence in some areas of their lives.[34]

For example, Egyptian women have a higher illiteracy rate than Egyptian men, especially in rural areas. EACPE's shadow report indicated that the male illiteracy rate is 38 per cent while the female rate is 62 per cent. The main reason for that, according to EACPE's shadow report, is 'insufficient and inefficient schools, as well

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[34] According to EACPE's shadow report, progress can be seen in the People's Assembly where women had been granted 64 seats, the promulgation of the Family Courts Law, Egyptian women being granted the right to give their nationality to their children whose fathers are non-Egyptian, and the criminalization of female circumcision. Afaf Marei (Shadow Report Coordinator), *Second Shadow Report for the CEDAW Coalition Egypt 2009* (Egyptian Association for Community Participation Enhancement, 2009) 1, 5.

as the lack of parent's persuasion as to the effectiveness of their daughters' educations'.[35]

In relation to family law, EACPE's shadow report noted that women are still 'facing social, cultural and political problems'.[36] For example, despite the enactment of Law No 1 of 2000, which gives women the right to divorce their husbands (*khul*), men still 'have the exclusive right to divorce women, where women would embark on a tumultuous journey of litigations that take years to resolve in courts'.[37] In this sense, according to the shadow report submitted by the Center for Egyptian Women's Legal Assistance (CEWLA) in 2009, the *khul* law did not achieve its purpose because it faces many barriers due to 'its unclear executive formula in addition to the fact that women give up their rights in this law'.[38]

According to the shadow report submitted by the Alliance for Arab Women in 2009, the disadvantages that Egyptian women face stem not only from discriminatory family law, but also from difficulties obtaining access to justice.[39] This problem faces the majority of poor women because of the high cost of hiring lawyers, 'the time spent in court to get a court ruling on personal status issue is long, and the implementation of many of the court rulings especially on issues like alimony and others becomes impossible'.[40]

With respect to cultural patterns and article 5, EACPE's shadow report pointed out that the cultural and moral role expected of women reflects most people's views. This role, according to EACPE's shadow report, is promoted in the educational curricula. The expected roles of women can be found in the assumptions about 'the traditional duties and tasks, and sharing responsibility with men in the traditional framework'.[41]

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[35] Ibid 9.
[36] Ibid 15.
[37] Ibid.
[38] Azza Soliman (supervisor of the presented shadow report and the General Director of CEWLA), *The Shadow Report on the Status of Egyptian Women in Matters of Personal Status and Forms of Violence against Women According to CEDAW Convention* (Center for Egyptian Women's Legal Assistance, 2009) 1, 5.
[39] Fatma Khafagy, *Shadow NGO Report on Egypt's Fourth and Fifth Combined Periodic Report to the Committee on the Elimination of Discrimination against Women* (Alliance for Arab Women, 2009) 1, 15.
[40] Ibid.
[41] Marei, above n 34, 23.

These assumptions continue to reinforce the idea that men are the head of the family and the breadwinner.

This shadow report indicated further that, although the state's policies attempt to eliminate negative social patterns, the media still plays a crucial role in presenting men's and women's roles in society. In addition to the negative role that the media play in this matter, the law makers have failed to recognize how to implement the principles of the Egyptian Constitution in the real world. EACPE's shadow report noted that, despite the notable efforts that the National Council for Women (NCW) made through the Media Watch Unit to monitor the various media channels, societal customs and traditions still make promoting women's status in Egyptian society challenging.[42] The Center for Egyptian Women's Legal Assistance's (CEWLA)'s shadow report mentions that, although Egypt is the most advanced among Arab and Islamic countries in granting the legal right to equality, Egyptian society had not yet reached the goal of substantive equality.[43] In real life many Egyptian women are subject to discrimination and inequality.

Violence against women is one of the manifestations of inequality. According to CEWLA's shadow report, many Egyptian women face sexual harassment, domestic violence and female circumcision. Many of the types of violence that are practised against women are culturally accepted to some degree. Honour killing continues, according to CEWLA's shadow report, because of the idea that the perpetrator of such crimes is a hero because he 'committed the crime in defence of (Honor)' and according to 'the customs and traditions that would enhance the situation of the perpetrator'.[44] According to CEWLA's shadow report, the true problem cannot be reduced to just traditional and cultural values. In addition to these, the law 'grants lenient sentences to the perpetrators of such crimes. Moreover, this issue is not governed by a legislative text, but it is left to the judge's estimation, which reflects the judge's values.'[45]

As can be seen here, Egyptian women face many obstacles that prevent them from achieving formal and substantive equality. As I mentioned previously, the concept of

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[42] Ibid 24.
[43] Soliman, above n 38, 3.
[44] Ibid 10.
[45] Ibid.

male chauvinism might not be an appropriate concept to explain the reality of women's inferior status in Egypt. An explanation given by one of the Egyptian representatives at a 2001 meeting to consider a previous Egyptian report revealed an understanding of the cultural background that constitutes women's inferior status. At the meeting to consider Egypt's third report and the combined fourth and fifth periodic reports in 19 January 2001, one of the Egyptian representatives stated that the government was willing to enhance its efforts to eliminate discrimination against women and to promote gender equality. She stated that 'cultural constraints and traditions sometimes impeded change and obstructed implementation of the law'. The Egyptian representative argued that, based on this understanding, the government, through collaboration with Egyptian intelligentsia and the National Council for Women, 'would seek to use indigenous formulations, which were deeply rooted in Egyptian and Islamic culture and which asserted the equality between women and men'.[46] As the Egyptian representative pointed out, such work requires a collaboration of many actors. She stated that:

> With the aid of all concerned, governmental and non-governmental organizations, the National Council for Women would participate in campaigns to raise awareness and ensure proper interpretations, clarify misinterpretations of religious concepts and demonstrate that the principles of sharia provide for the full equality of women with men, and respect for women's human dignity.[47]

This explanation demonstrated a clear understanding of the cultural background and the ways it can be used to promote change. In addition, there was a clear understanding of the importance of vernacularizing CEDAW's articles. However, there was no reference to this argument in the 2008 Egyptian report. Such an explanation would be appropriate in the periodic report because it identifies some elements of the cultural background and suggests how they could be challenged. It would be useful for Egypt to provide a more detailed explanation of this process in the section about article 5(a) in each periodic report that it submits to the CEDAW Committee. This could be expanded into a comprehensive strategy. But this did not

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[46] Committee on the Elimination of Discrimination against Women, *Concluding Comments of the Committee on the Elimination of Discrimination against Women: Egypt*, 24th sess, Supp No 38, UN Doc A/56/38 (15 January – 2 February 2001) [318] <http://www.un.org/womenwatch/daw/cedaw/cedaw25years/content/english/CONCLUDING_COMMENTS/Egypt/Egypt-CO-3_%20CO-4-5.pdf>. The committee considered Egypt's third report and the combined fourth and fifth periodic reports (UN Docs CEDAW/C/EGY/3 and CEDAW/C/EGY/4–5) at its 492nd and 493rd meetings, on 19 January 2001 (UN Docs CEDAW/C/SR. 492 and 493).
[47] Ibid.

happen in the 2008 Egyptian report. As I will show in the next section, the CEDAW Committee therefore found that Egypt had not provided a comprehensive strategy for compliance with article 5(a).

2. The CEDAW Committee's consideration of Egypt's sixth and seventh reports

The CEDAW Committee considered Egypt's combined sixth and seventh periodic reports at its 918th and 919th meetings (45th session) on 28 January 2010.[48] The committee in its concluding observations stated that:

> 22. The Committee urges the State party to put in place without delay *a comprehensive strategy*, including the review and formulation of legislation and the establishment of goals and timetable, to modify or eliminate traditional practices and stereotypes that discriminate against women, in conformity with articles 2(f) and 5(a) of the Convention. Such measures should include efforts to raise awareness of this subject, targeting women and men at all levels of society, in *collaboration with civil society*. The Committee calls upon the State party to use innovative and effective measures to strengthen understanding of the equality of women and men and to work with the media to promote a positive, non-stereotypical and non-discriminatory portrayal of women.[49]

In its concluding observations the CEDAW Committee raised certain issues regarding the Egyptian approach to article 5 (regarding stereotypes and cultural practices).[50] The committee expressed its concern 'at the persistence of practices, traditions, patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men in all spheres of life'. The committee argued that the disadvantageous situation in which women found themselves in the context of culture and society was derived from their unequal status in many areas. These areas included 'education, public life, decision-making, marriage and family relations, and the persistence of harmful traditional practices and violence against women'. The committee stated that the unequal status of women in these areas could be seen as evidence that the state party had not taken 'effective and systematic action to modify or eliminate stereotypes and negative traditional values and practices'.[51]

The committee also noted that, despite the establishment of a media watch unit within the National Council for Women and the preparation of a media strategy,

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[48] Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Egypt*, UN Doc CEDAW/C/EGY/CO/7 (28 January 2010) [2].
[49] Ibid [22] (emphasis added).
[50] Ibid [21].
[51] Ibid.

stereotypical portrayals of women in the media persisted. This in turn, as the committee pointed out, may encourage discrimination 'and undermines equality between men and women'.

B. The 2009 Tunisian report

Under article 5, Tunisia's combined fifth and sixth report stated that, during the period covered by the report, Tunisia continued its efforts to change behaviour and mindsets to eliminate stereotypical patterns related to women. The report stated that Tunisia paid close attention to all factors enabling the elimination of stereotypical patterns and verbal and physical violence against women through the adoption of appropriate legislative, institutional and cultural measures.[52]

These measures included educational programs, awareness and information programs, and combating violence against women. Regarding the first measure, educational programs, Tunisia reported that it had made efforts to change the negative image of women in the media. It also made efforts to revise primary and high school texts to ensure the positive portrayal of women.[53] In higher education, '191 higher education institutes make use of lectures, courses, directed studies and seminars to teach human rights as part of the effort to combat stereotypes in their various forms'.[54]

In the National Adult Education Programme, instituted in 2000, the teaching content included 'general culture courses on civic rights and duties and on national legislation regulations defining relations between women and men and protecting women's rights'.[55] Another educational program, named 'specialized instruction', was responsible for training state officials.[56]

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[52] Committee on the Elimination of Discrimination against Women, *Combined Fifth and Sixth Periodic Reports of State Parties: Tunisia*, UN Doc CEDAW/C/TUN/6 (20 May 2009) [45] ('*Tunisia's Report 2009*').

[53] Ibid [46].

[54] Ibid [48].

[55] Ibid [49]. The national legislation and regulations that define the relationship between women and men and protect women's rights are the Constitution, Code of Personal Status (CPS) and Labour Code.

[56] Ibid [50]. The report defined state officials as officials of the Superior Institute of the Magistracy, the National School of Administration, the School for National Security Agencies, and the Superior School for Agents of the Penitentiary Administration. This follows upon the CEDAW Committee's recommendation, in the previous Tunisian report of 2002, for 'the intensification of education and training programmes on the Convention to enhance the knowledge of judges, lawyers and law enforcement personnel'. UN GAOR, 57th sess, Supp No 38, UN Doc A/57/38 (7 May 2002) [193]. See *Tunisia's Report 2009* [20].

In the second measure taken towards compliance with article 5, Tunisia established awareness and information programs; for example the Ministry of Women's Affairs, the Family, Children and Older Persons 'launched an awareness campaign for children at all levels of education … utilizing lectures and debates in collaboration with the various ministries and components of civil society'.[57] This program targeted children and young people via the media (TV and radio). As Tunisia's report pointed out:

> 52. The Tunisian media (television channels, radio stations and the printed press) are contributing to efforts at public dissemination of the values of women's rights, non-discrimination, and respect for differences. TV and radio spots have been produced and broadcast during the period covered by this report over the various national and regional TV and radio networks. These spots deal with civil behaviour within the family, egalitarian sharing of household tasks, communication as a way of resolving marital disputes, dialogue between parents and teenagers, and cooperation between parents and children in the management of household budgets.[58]

A third measure directed at compliance with article 5 aims to combat violence against women. Tunisia's report included this measure under article 5 as a response to the CEDAW Committee's concluding comments on the previous Tunisian report from 2002. One of the recommendations in this regard is that 'the Committee calls upon the State party to create public awareness of violence against women as an infringement of human rights that has grave social costs for the whole community'. In its response to this recommendation, the 2009 Tunisian report stated that 'Tunisia has taken a number of steps … involving legislative protection, the prevention and elimination of violence against women, public communication and awareness, and the diagnosis of the problem of violence against women'.[59] This step taken by the Tunisian government is important because violence against women can be considered the main consequence of the gender stereotypes that enforce the inferior status of women in society. This will be illustrated in the following section on shadow reports.

Although the Tunisian report addressed the necessity of human rights education in promoting compliance with article 5 and eliminating violence against women, it seems that it focuses on article 5(b) more than article 5(a). It appears that Tunisia treats article 5 as if it is only concerned with sharing responsibility between women

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[57] *Tunisia's Report 2009* [51].
[58] Ibid [52].
[59] Ibid [54].

and men in household work and raising children. The Tunisian report says little about challenging the cultural background that constitutes the inferior status of Tunisian women.

The Tunisian report stated that awareness raising had been organized through the media and educational measures to promote compliance with article 5 and to combat violence against women. But it did not explain how such measures operate and how they challenge the cultural determinants of the traditional role of women, as will be addressed in the following section.

1. Tunisian shadow reports

For Tunisia, two reports were submitted by civil society organizations and one report was submitted by the International Labour Organization, a specialized agency of the United Nations system, to the CEDAW Committee regarding the consideration of the fifth and sixth combined reports submitted to the CEDAW Committee on 27 April 2009. The International Disability Alliance (IDA) submitted one of these reports. IDA's report noted that Tunisia had taken a number of legislative measures in order to combat all forms of discrimination against women. One of these legislative measures was Law No 58 of 2006, which allows mothers 'of young and handicapped children to work part-time at two-thirds pay while retaining full rights to advancement, promotion, holiday, retirement and social coverage'.[60]

The Association Tunisienne des Femmes Démocrates (ATFD) report submitted to the CEDAW Committee in 2010 raised many issues regarding Tunisian women's rights. ATFD's report noted that the reservations made by Tunisia are still an obstacle to Tunisian women's full enjoyment of their human rights. Such reservations 'contribute to the persistence of practices and customs that confine women to a traditional role'.[61] The ATFD's report pointed out that it is difficult to evaluate women's political participation since the quantitative indicators are insufficient. The available indicators

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[60] International Disability Alliance, *Suggestions for Disability-Relevant Recommendations to be Included in the Concluding Observations of the Committee for the Elimination of Discrimination against Women*, 47th sess (4–22 October 2010).

[61] Association Tunisienne des Femmes Démocrates, *Women's Rights in Tunisia Declaration: Summary of Key Concerns Submitted by the Association Tunisienne des Femmes Démocrates (ATFD) to the United Nations Committee on the Elimination of Discrimination against Women*, 47th sess (October 2010) 1.

'do not measure the effectiveness of women's rights and do not convey the real democratic participation of citizens'.[62]

The ATFD's report made some recommendations with respect to this matter. To name a few, the report recommended that the state should amend the Tunisian Constitution to entrench the principle of non-discrimination between men and women. Furthermore, the state should put an end to 'the State and dominant party's seizure of information and means of communication in order to guarantee freedom of expression'. Moreover, the state should allow 'autonomous associations to take part in strategic choices for the country'. In addition, the Tunisian government should liberalize political life and should respect the provisions of the Constitution and legislation'. Also, the government should separate politics from religion in order to 'guarantee the rules of democracy and equality between men and women'.[63]

The International Labour Organization (ILO) submitted a report regarding the implementation of articles 21 and 22 of CEDAW. It noted that 'no court rulings had been handed down on the prohibition of sexual harassment'.[64] The ILO Committee noted that victims 'might be reluctant to report cases of sexual harassment', possibly due to the low level of awareness of this problem. On this basis, the ILO Committee encouraged 'the Government to take the necessary measures to raise public awareness on the issue of sexual harassment at the workplace'.[65] The committee noted that the data of the Ministry of Education and Training showed there is progress in women's participation in vocational training. However, it noted that there are some restrictions on women's choice of work because families give 'priority to areas that were supposed to be more "suitable for girls"'.[66] Therefore, the committee requested the Tunisian government to provide 'detailed information on the measures adopted to

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[62] Ibid 2.
[63] Ibid 3.
[64] Committee on the Elimination of Discrimination against Women, *Implementation of Articles 21 and 22 of the Convention on the Elimination of All Forms of Discrimination against Women: Reports Provided by the Specialized Agencies of the United Nations System on the Implementation of the Convention in Areas Falling within the Scope of their Activities: Note by the Secretary-General: International Labour Organization*, Item 5 of the provisional agenda, 47th sess, UN Doc CEDAW/C/2010/47/3/Add.4 (14 August 2010) [48].
[65] Ibid.
[66] Ibid [49].

envisaged to combat attitudes based on stereotypes which limited the participation of women to traditional training courses'.[67]

Although Tunisia could be considered the most progressive country in the Arab world regarding women's human rights, before the so-called Arab Spring Tunisia was governed by an authoritarian regime. This regime restricted the activities of human rights defenders and put them and their families under the security police's surveillance.[68] Furthermore, Tunisian authorities 'block human rights lawyers from meeting their clients and … human rights lawyers are frequently attacked and physically assaulted'.[69] Moreover, the Tunisian authorities abused the 2003 anti-terrorism law because they used it to criminalize freedom of expression and as 'a tool to silence and punish critics of the government'.[70] In addition, Tunisian authorities restricted freedom of assembly.[71]

2. The CEDAW Committee's consideration of Tunisia's fifth and sixth reports

The CEDAW Committee considered the combined fifth and sixth periodic report of Tunisia at its 949th and 950th meetings (47th session) on 7 October 2010. In its concluding observations the committee stated that the Tunisian report had identified 'deep-rooted stereotypes' as the main barrier to withdrawal from its reservations to CEDAW and its failure to comply fully with article 5.[72] The CEDAW Committee hence urged the Tunisian government to 'put in place without delay a comprehensive strategy'.[73] This comprehensive strategy should be established along with goals and a timetable to 'eliminate patriarchal attitudes and stereotypes that discriminate against women, in conformity with article 2(f) and 5(a) of the Convention'.[74] The strategy should include efforts to raise awareness, it should be directed to both women and men, and it should be developed in 'collaboration with civil society'. The CEDAW

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[67] Ibid.

[68] Human Rights Council, Working Group on the Universal Periodic Review, *Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(C) of the Annex to Human Rights Council Resolution 5/1: Tunisia*, UN Doc A/HRC/WG.6/1/TUN/3 (11 March 2008) [26].

[69] Ibid [16].

[70] Ibid [23].

[71] Ibid [28].

[72] Committee on the Elimination of Discrimination against Women, *Concluding Observations of the Committee on the Elimination of Discrimination against Women: Tunisia*, UN Doc CEDAW/C/TUN/CO/6 (5 November 2010) [25].

[73] Ibid.

[74] Ibid.

Committee also called upon Tunisia to 'protect media pluralism and guarantee freedom of speech and access to information'[75] in order to encourage 'broader public discussions and benefit from the dynamism and creativity of civil society in order to get the root causes of gender discrimination and to promote a positive, non-stereotypical and non-discriminatory portrayal of women'.[76]

The CEDAW Committee noted that the focus on media and educational programs to change stereotypical views of women was inadequate. In its concluding observations, the CEDAW Committee wrote:

> 24. The Committee recognizes the State party's efforts to promote a change in the stereotypical roles of women, notably through media and educational programmes. It remains concerned, however, at the persistence of patriarchal attitudes and deep-rooted stereotypes regarding the roles, responsibilities and identities of women and men. The Committee is also concerned at the resurgence of adverse cultural norms, practices perpetuate discrimination against women and girls as reflected in their disadvantageous and unequal status in many areas, including in employment, decision-making, marriage and family relations, and the persistence of violence against women.[77]

The committee further noted that there was no mention of the term 'gender equality' in the entire report. At the constructive dialogue meeting between the CEDAW Committee members and the state party's members, one of the committee members stated that 'the Convention required State parties to aim at de facto gender equality', and she 'expressed concern that the term "gender equality" appeared nowhere in the State party report'.[78] She asked about the Tunisian government's understanding of the concept of equality and whether this was reflected in its national policies and its implementation of the Beijing Platform for Action strategy on gender equality.[79]

Another point that was raised by the CEDAW Committee concerned the relationship between non-governmental organizations (NGOs) and the Tunisian government. One of the committee members pointed out that 'the State party had stated that NGOs played an essential role, yet the Committee had received reports that a number of NGOs had encountered obstacles in carrying out their work'.[80] Another CEDAW Committee member indicated that, according to recent reports produced from reliable

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[75] Ibid.
[76] Ibid.
[77] Ibid [24].
[78] Committee on the Elimination of Discrimination against Women, *Summary Record of the 949th Meeting: Tunisia*, UN Doc CEDAW/c/SR.949 (7 October 2010) [16].
[79] Ibid.
[80] Ibid [13].

sources, NGOs criticized Tunisian state policy because NGOs were barred 'from participating in the formulation of Government programmes and policies, and that the movements of human rights NGOs were being restricted and their members harassed, persecuted and arbitrarily arrested'.[81] The committee member asked whether 'the delegation agreed that the rights to freedom of association, freedom of assembly and freedom of expression must be respected'.[82] These rights would facilitate the task of NGOs to continue 'helping to consolidate democracy and strengthen civil society in Tunisia'.[83]

In response to this comment, the Tunisian representative replied:

> Civil society played a very important role in Tunisia and NGOs were widely consulted on Government policy in many areas, through advisory councils established specifically for that purpose … despite allegations to the contrary, NGOs had participated in the preparation of the State party report. All NGOs that acted in accordance within the law received financial help from the Government.[84]

As Chapter 5 discussed, until the Arab Spring Tunisia was an authoritarian country. At the same time, it was progressive in women's rights in comparison with other Arab countries. As Chapter 5 has shown, after Tunisia gained independence from France in 1956, the government did not encourage independent social forces including feminist and human rights groups. Rather, it encouraged the existence of feminist and human rights organizations which relied on the permission of the government. In other words, the state adopted official feminist and human rights organizations. Therefore, there was no place for independent feminist or human rights organizations at that time.

IV. Discussion

When one talks about the vernacularization of CEDAW's norms and principles, one is talking about the translation of external ideas into a particular social context. Such vernacularisation or translation forms one axis of the background-vernacularist approach which I introduced in Chapter 2. The social context will already have its own social meanings and cultural values that form the background of that society. History, religion, language, politics, national law and culture make up the background

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[81] Ibid [48].
[82] Ibid.
[83] Ibid.
[84] Ibid [51].

of social meanings and cultural values, and these sometimes lead to resistance to the application of human rights conventions as well as to the possibility of translating human rights norms into the local context. For this reason, the background-vernacularist approach suggests that, in order to make it possible to translate human rights norms into the local context, it is important also to change the social meanings and cultural values that constitute the cultural background. In other words, the background-vernacularist approach is about promoting changes to the cultural background in order to enable the vernacularization of human rights norms and principles. The two strategies complement each other.

The background-vernacularist approach in this sense is a combined approach. It can be both a bottom-up approach and a top-down approach. This is because both vernacularization and changing the background are attentive to the everyday meanings of a society as well as to elite and external meanings. To understand how it operates in this manner, it may be useful to consider Mashood Baderin's discussion of how human rights could be promoted in Muslim-majority countries.[85]

In his discussion of the promotion of human rights in the Muslim world, Baderin suggests that two approaches should be applied together: a socio-cultural approach, which is the bottom-up approach, and a politico-legal approach, which is the top-down approach. Baderin points out that human rights discourse and advocacy have focused comprehensively on the politico-legal approach without paying close attention to the socio-cultural approach. Baderin notes that the socio-cultural approach is as crucial as the politico-legal approach for the promotion of human rights in a given social context, especially in 'the developing world of which most Muslim States are part'.[86]

The socio-cultural approach, Baderin explains, relates to 'education, information, orientation and empowerment of the populace through the promotion of a local understanding of international human rights norms and principles'.[87] Through this approach, Baderin argues, 'positive social change and a cultural link to human rights

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[85] Mashood A Baderin, 'Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and two Divergent Perspectives' (2007) 4(1) *Muslim World Journal of Human Rights* 1.
[86] Ibid 6.
[87] Ibid.

can be advocated'.[88] For Baderin, such an approach could be deployed by human rights advocates to challenge the cultural relativist discourse, which is the main discourse deployed by states to justify violations of human rights. In this sense, Baderin argues, the cultural relativist argument can be challenged by 'the populace themselves from within the relevant norms of respective societies'.[89] The socio-cultural approach, Baderin explains, 'is a positive means for realizing human rights through relevant social and cultural norms that already exist within different societies and communities'.[90]

The politico-legal approach to human rights, Baderin argues, 'relates to human rights responsibility and accountability on the part of the State and its organs'.[91] This approach asserts that the states parties should protect and promote human rights through their relevant political and legal policies. For Baderin, the developed states 'are often more responsive to the politico-legal approach than developing States'.[92] The politico-legal approach, as Baderin argues, suggests that the states should take responsibility for respecting and protecting human rights. The politico-legal approach considers 'good governance, positive political will, justice, good faith, and judicial independence' as prerequisites for states' successful realization of human rights.[93]

However, although the politico-legal approach is important, it cannot be the main approach to promoting human rights. From a feminist legal perspective, Margaret Davies points out that 'recent literature shows that legal feminists have identified a number of issues which can appear to be standing in the way of progress'.[94] As Davies indicates, there is scepticism toward law reform as a single source of change. This scepticism is a source of pessimism for legal feminists, because it is not always clear how change can be effectively achieved. Davies points out that legal feminists

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[88] Ibid.
[89] Ibid.
[90] Ibid.
[91] Ibid 8.
[92] Ibid 8.
[93] Ibid 8.
[94] Margaret Davies, 'Notes Toward an Optimistic Feminism: A Long View' in Asa Gunnarsson, Eva-Maria Svensson and Margaret Davies (eds), *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (Ashgate, 2007) 213, 214; see also Johanna Niemi-Kieilainen, Paivi HonKatukia and Minna Ruuskanen, 'Legal Texts as Discourses' in Asa Gunnarsson, Eva-Maria Svensson and Margaret Davies (eds), *Exploiting the Limits of Law: Swedish Feminism and the Challenge to Pessimism* (Ashgate, 2007) p?; Carol Smart, *Feminism and the Power of Law* (Routledge, 1989) 1–20; Carol Smart, *Law, Crime And Sexuality* (Sage, 1995) 186–202.

have argued that 'change in substantive law does not necessarily result in an improved situation for women'.[95] Legal feminists, as Davies points out, have argued that in a Western context, the values of 'Western positive legal systems' are dominant. Such dominant values have a tendency to reproduce 'the values stereotypically associated in the cultural sphere with masculinity'. Therefore, legal feminists 'need to be cautious about taking action which tends to legitimate those values'.[96] In other words, as Davies summarizes this point of view, the law cannot be considered the only source of social change, because the current law still reproduces the values that build barriers against the progress of women individually and collectively in the social and political levels. Hence, instead of expecting that change will occur through legislative reforms, other ways to challenge the major assumptions of law are required.[97]

Drawing upon this argument, the background-vernacularist approach could be considered a combined approach, which includes the socio-cultural approach *and* the politico-legal approach. In this sense, the socio-cultural approach can be seen as a 'bottom-up' strategy and the politico-legal approach as a 'top-down' strategy. In relation to the background-vernacularist approach, the politico-legal approach and socio-cultural approach can be understood in several ways.

It is probably true that working with politics and law is usually top-down, and working with culture is usually about everyday life, so it is a bottom-up approach. However, it may be more complicated than this because vernacularization is not the same thing as using a politico-legal or even entirely top-down approach. This is because, even if politico-legal means might be used to assist with vernacularizing human rights, vernacularization can also take place without any political or legal intervention, as discussed in Chapter 2. Vernacularization of human rights is a process of bringing external concepts into local discourse. Therefore, it is a top-down approach because it brings new concepts from outside *and* a bottom-up approach because it deploys the local discourse to enable such external concepts to be adopted. Similarly, the background approach is mainly about trying to alter the everyday conditions of thought, so it is a bottom-up approach. In addition, however, it might be promoted by intellectual and elite discourse, and therefore it is a top-down approach.

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[95] Davies, above n 94, 215.
[96] Ibid.
[97] Ibid.

Changing the cultural background can even be promoted by legal means such as enacting the law to ban polygamy in Tunisia, as discussed in Chapter 5. The extent to which legal means can successfully change the cultural background or not is an interesting question, but one which I do not have space to consider in detail here.

It could be argued that the idea that it is necessary for socio-cultural and politico-legal approaches to work together has parallels with the philosophy of the Sisterhood Is Global Institute (SIGI) project Claiming Our Rights, which was discussed in Chapter 2. As I pointed out in Chapter 2, through this program SIGI attempted to bring the norms and principles of human rights stipulated in international human rights conventions to ordinary people in Muslim-majority countries. SIGI's program aimed to develop educational models that could use 'indigenous ideas, concepts, myths, and idioms to explain and support the rights contained in international documents'.[98] It aimed to enable women to see themselves as human beings with equal rights in the context of Islam.

The communication model for human rights education proposed by SIGI can be considered a model of how compliance with article 5(a) should be promoted. I discussed this model in Chapter 2, but it might be useful to highlight the main points of this model here as it is relevant to understanding what approaches will be sufficient to ensure compliance with article 5(a).

As I discussed in Chapter 2, the communication model proposed by SIGI has four elements: a communicator, a medium, a message and an audience. In addition, it requires the state to participate in the project to facilitate the process of human rights education. As highlighted above, the communicators in Egypt were the National Council for Women, the Ministry of Education, the Ministry of Culture, the Ministry of Information and governmental organizations and NGOs. In Tunisia, the communicators were the Ministry of Women's Affairs and the Ministry of Education. The medium for both Egypt and Tunisia was the media. However, as I have explained in this chapter, the message in both Egypt and Tunisia was not defined clearly. In Egypt, the message was based on countering male chauvinism. In Tunisia, the message was based on raising awareness of the importance of sharing responsibility

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[98] Mahnaz Afkhami and Haleh Vaziri, *Claiming Our Rights: A Manual for Women's Human Rights Education in Muslim Societies* (Sisterhood Is Global Institute, 1996) ii.

for housework between women and men. Both Egypt and Tunisia focused on students and government employees in human rights education as the main audience of their national project.

In this sense, looking at Egypt and Tunisia through these perspectives, we find that Tunisia provides a good example of strong willingness to promote compliance with article 5 in general. Despite the fact that, as I addressed previously, the 2009 Tunisian report paid more attention to article 5(b) than article 5(a), when it talked about article 5, Tunisian measures for compliance were more fully defined than the measures taken by Egypt.

V.   Conclusion

This chapter started with an explanation of the nature of article 5(a), which asks states parties to change the cultural roles that determine the inferior status of women in society. As I discussed in this chapter, both the Egyptian and Tunisian governments have indicated that they have made some efforts in media and education to change gender stereotypes. However, as the shadow reports on the disadvantages faced by women showed, women in Egypt and Tunisia still face cultural barriers that undermine their enjoyment of human rights. On this basis, the CEDAW Committee asked Egypt and Tunisia to develop a comprehensive strategy and timetable as well as goals for the implementation of article 5.

The chapter has further explained the relationship between the socio-cultural approach and the politico-legal approach on one hand and their relationship to the background-vernacularist approach. As I discussed in this chapter, neither the socio-cultural nor the politico-legal approach is sufficient in itself to promote change. Rather they are both necessary; they are complementary and mutually reinforcing. The background-vernacularist approach is more likely to be a socio-cultural approach, which operates as a bottom-up strategy. This bottom-up strategy can be useful alongside the politico-legal approach, which is a top-down strategy. In this sense, it can work in two ways. First, it can be argued that it is a socio-cultural approach, which has both a top-down element, which is the vernacularization of human rights norms, and a bottom-up element, which is changing the cultural background. Second, it can be argued that the background-vernacularist approach comes in sideways (to the middle) and works to translate legislative reform into a particular situation, as well as

to condition the background to admit the legislative reform. In this chapter, I have used the example of SIGI's program Claiming Our Rights, which was discussed in Chapter 2, to provide a clear example of how the background-vernacularist approach could be used as a theoretical framework for analysing Egyptian and Tunisian compliance with article 5(a).

Chapter 8

The background-vernacularist approach and CEDAW

I.   Introduction

The central argument of this thesis is that, in order to make compliance with CEDAW possible, states parties should be willing to challenge the cultural background that forms the basis of resistance to the application of CEDAW. In particular, cultural tools and values should be deployed as part of the process of promoting compliance with CEDAW.

In order to understand how cultural tools and values could be deployed, I have presented what I call the background-vernacularist approach. As I explained in Chapter 2, I have used this approach as a theoretical framework for my analysis. It explains how the cultural background in a particular society can be challenged and how human rights norms can be translated into the local discourse.

The background-vernacularist approach therefore prescribes both cultural change and vernacularization of human rights. However, it does not prescribe a detailed blueprint for change or a single strategy for compliance. The reasons why a single strategy is not possible were explained in Chapter 1. As I indicated there, it would be a difficult task and beyond the scope of thesis to investigate the entire cultural background of norms that constitute women's inferior status in Egypt and Tunisia. In addition, prescribing a detailed blueprint for compliance would require me to investigate comprehensively the works of the states parties and the CEDAW Committee in much more detail, which is not possible as there are far too many layers and intricacies involved. However, in this final chapter I will explain briefly what the strategy for compliance with article 5(a) should include and how it could be reported in the national reports submitted to the CEDAW Committee.

The idea of deploying cultural values to enable human rights norms and principles to be placed in the local discourse and to enable compliance with human rights conventions is not new, as I explained in Chapter 2 and as I will further discuss later in this chapter. What is new in this thesis is the theoretical framework and interpretive lens that I present, which is the background-vernacularist approach. This framework

consolidates existing approaches into a concept which can be deployed more generally.

The language of this approach provides idioms and concepts that enable us to understand the elements of the cultural background, on the one hand. On the other hand, it also enables us to understand the procedures used to challenge the cultural background in existing literature and the intellectual history of Egypt and Tunisia, as discussed in chapters 4 and 5.

Furthermore, the background-vernacularist approach provides a better understanding of how hybrid discourse operates. As I discussed in chapters 2 and 3, human rights discourse can (and should) be a hybrid discourse that can mediate between human rights culture and local culture. In this way, this discourse can challenge itself and vernacularize new concepts. I have given examples of how such a discourse has been used in chapters 4 and 5. In Chapter 4, I discussed al-Tahtawi's argument and I showed how he adopted an in-between space to argue for Western science. In addition, I briefly discussed Abdu's attempt to challenge the cultural background of polygamy, which was based on religious interpretations. Furthermore, in Chapter 4, I re-interpreted Amin's argument through the lens of the background-vernacularist approach as well as al-Haddad's argument in Chapter 5.

Despite the fact that these writers made their arguments a long time ago, many of the ideas and in particular the approach are still applicable now. It is necessary to understand their arguments through specific modern concepts and idioms because religion and culture still play a dominant role in Egypt and Tunisia and other countries, when it comes to compliance with human rights conventions.

In chapters 6 and 7, I used the background-vernacularist approach to consider the withdrawal from some reservations made by Egypt and Tunisia to CEDAW as well as compliance with article 5(a). In Chapter 6, I highlighted the main points that may enable us to understand the relationship between the state's willingness to comply with CEDAW and its attempt to challenge the cultural background. Chapter 7 discussed Egyptian and Tunisian compliance with article 5(a). However, Egypt and Tunisia have not demonstrated a sufficient understanding of the strategies needed for compliance with article 5(a). Therefore, the CEDAW Committee has urged both

Egypt and Tunisia to propose a comprehensive strategy to promote compliance with article 2(f) and 5(a) of CEDAW.

The question here is how a comprehensive strategy could promote compliance with articles 2(f) and 5(a). As I have indicated, my aim is not to prescribe a blueprint for how the cultural background could be changed in order to enable compliance with the articles of CEDAW. For this purpose, this chapter provides further discussion of the state's willingness to comply with CEDAW and culture in order to emphasise the importance of these points in promoting compliance with CEDAW. In addition, this chapter sheds light on some international human rights documents that could be useful to consider to understand how the state's willingness and the role of culture are important for the promotion of women's human rights stipulated in CEDAW.

This chapter is divided into three parts, after this introduction. Part II discusses the states parties' obligations under CEDAW by considering article 2(f). Although there was some discussion of article 2 in chapters 1 and 6, it is necessary to discuss article 2(f) more extensively in this chapter in order to better understand the state's willingness to comply. Part III discusses the concept of culture. I have chosen to discuss culture in this chapter rather than in earlier chapters because I thought it was preferable to explain the background-vernacularist approach before considering the nature of culture. Previous chapters support my assertion about the need to take culture into account even if culture can be considered one of the main sources of women's oppression. Moreover, explaining the nature of culture in this chapter enables me to conclude by denying some of the claims of cultural essentialism, as discussed in Chapter 3, and some of the arguments about cultural relativism as I will discuss later in this chapter. Finally, it is appropriate to discuss culture in this chapter because it prepares the way for a selective consideration of the argument presented in a study by the Human Rights Council Advisory Committee (HRCAC) that suggests that a better understanding of traditional values of humankind can be useful for promoting human rights. This is the subject of Part IV of this chapter. In this concluding part of the thesis I attempt to provide a better understanding of why the deployment of cultural tools to promote women's human rights is important. Without providing a detailed discussion, I read this argument through the lens of the background-vernacularist in order to highlight a possible strategy for compliance with article 5(a).

II. The state's commitment to comply with CEDAW

Christine Chinkin points out that the 'need to reassert and reaffirm the principles of CEDAW is ever more important for the lives of women throughout the world'.[1] CEDAW has conceptualized the equality of women in several different ways including formal, substantive and transformative equality.[2] The CEDAW Committee's *General Recommendation No 25*, commenting on article 4(1), which was adopted in January 2004, confirmed the object and purpose of CEDAW as the following:

> 1. to ensure full equality of women before the law and protection against discrimination in the public as well as the private sphere;
>
> 2. to improve the de facto position of women; and
>
> 3. to address prevailing gender relations and the persistence of gender-based stereotypes.[3]

Accordingly, these three purposes reflect three principles of equality.

First, they reflect full equality between women and men. As Rikki Holtmaat points out, many of CEDAW's articles assert formal legal equality.[4] CEDAW's articles require that women should not be treated unequally to men before the law.[5] It could be argued that the main article that asserts this is article 2.[6]

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[1] Christine Chinkin, 'Thoughts on the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)' in Meena Shivdas and Sarah Coleman (eds), *Without Prejudice: CEDAW and the Determination of Women's Rights in a Legal and Cultural Context* (Commonwealth Secretariat, 2010) 1, 7.
[2] Rikki Holtmaat and Jonneke Naber, *Women's Human Rights and Culture: From Deadlock to Dialogue* (Intersentia, 2011) 85, 104.
[3] Rikki Holtmaat, 'The CEDAW: A Holistic Approach to Women's Equality and Freedom' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2013) 95, 106.
[4] Ibid.
[5] Ibid.
[6] The CEDAW Committee's *General Recommendation No 28* on the core obligation of states parties, at [4], states that article 2 determines the objective of CEDAW as 'the elimination of all forms of discrimination against women on the basis of sex'. It points out, at [6], that article 2 'is crucial to the full implementation' of CEDAW, 'since it identifies the nature of the general legal obligations of States parties'. Therefore, the CEDAW Committee, at [41], considers reservations to article 2 or to its subparagraphs to be 'incompatible with the object and purpose of the Convention and thus impermissible under article 28, paragraph 2'. However, this does not mean that when states parties enter reservations to article 2 or its subparagraphs the states parties are not obliged to comply with the other articles or make efforts to withdraw from such reservations [42]. So the obligations preserved in article 2 are 'linked with all other substantive provisions of the Convention' [6]. Article 2 requires that 'States parties refrain from making laws, policies, regulations, programmes, administrative procedures and institutional structures that directly or indirectly result in the denial of the equal enjoyment by women of their civil, political, economic, social and cultural rights' [9]. See Committee on the

Under article 2, states parties not only have an obligation not to discriminate against women, they also have an obligation to respond and take action against any manifestation of discrimination against women. The occurrence of discrimination against women is taken to be evidence that states have failed to 'take necessary legislative measures to ensure the full realization of women's rights, the failure to adopt national policies aimed at achieving equality between women and men and the failure to enforce relevant laws'.[7]

The states parties' obligations under article 2 are not limited to discrimination against women by states apparatuses. States are also obliged to take into account private actors. In order to 'ensure that private actors do not engage in discrimination against women', the states parties should take appropriate measures to regulate the activities of private actors with regard to 'education, employment and health policies and practices, working conditions and work standards, and other areas in which private actors provide services or facilities, such as banking and housing'.[8] In article 2, subparagraphs (a), (f) and (g), states parties are obliged to 'provide legal protection and to abolish or amend discriminatory laws and regulations'.[9] Hence, states parties are obliged to abolish or at least to modify 'existing laws, regulations, customs and practices which constitute discrimination against women'.[10]

The purpose of CEDAW is not only legal equality, which can be achieved through legislative reforms and the abolition of some cultural or customary practices. A second purpose of CEDAW also aims to achieve substantive equality. As Holtmaat points out, in articles 3, 4 and 24 CEDAW makes it clear that 'all appropriate measures need to be taken in order to achieve women's de facto equality with men'.[11] Holtmaat writes:

> This means that sometimes (in the language of Article 4) temporary special measures are necessary. With the inclusion of the right to *substantive equality*, the Convention acknowledges that individual human beings, through place of birth, mental and physical

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Elimination of Discrimination against Women, *General Recommendation No 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, UN Doc CEDAW/C/GC/28 (16 December 2010) [4], [6], [9], [41], [42].
[7] Ibid [10].
[8] Ibid [12].
[9] Ibid [31].
[10] Ibid.
[11] Holtmaat, above n 3, 106.

capacities, wealth, development of the country, discrimination and a whole range of other factors, in fact have very different positions and possibilities in life. Women, in many cultures around the world, are in a position of inequality and oppression not only because of physical or biological differences, but also because of persistent political, social, economic and cultural discrimination against them.[12]

A third purpose of CEDAW is to change the cultural practices and patterns that enforce the inferior status of women in each society. The main article of CEDAW that deals with this issue is article 5, which I have discussed in Chapter 7. In her discussion of the importance of recognizing gender stereotypes as human rights violations because they enforce discrimination against women, Simone Cusack focuses on articles 2(f) and 5 as the main articles that make CEDAW a unique legal instrument that 'requires states to address gender stereotyping' and encourages them to abolish it.[13] Article 2(f), mentioned above, indicates that states parties are obliged to 'take all appropriate measures' to eliminate discrimination, while article 5, as we have seen, obliges states parties to make efforts to change 'gender stereotypes and fixed parental gender roles'.[14] Cusack's view is that these articles 'can produce measurable gains in the protection of the rights of women'.[15] Celestine Nayamu Musembi points out that articles 2(f) and 5(a) allow states parties to choose various methods in their efforts to fulfil their obligations of 'positive transformation of customary and religious practices to align with gender equality'.[16]

According to Holtmaat, gender stereotypes and 'fixed parental gender roles' suggest that women are not treated as respected, dignified and equal human beings and that women's autonomy is denied as a result. The notion of women's autonomy implies that women can live their life based on their choices and their own interests. Such gender stereotypes and fixed parental roles are based in the 'culture, tradition or religion, as well as in the main social and legal institutions or organisations of their society'.[17] Through the background-vernacularist lens, these gender stereotypes and cultural patterns constitute part of the background of the domestic legal and cultural

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[12] Ibid.

[13] Simone Cusack, 'The CEDAW as a Legal Framework for Transnational Discourses on Gender Stereotyping' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2013) 124, 132.

[14] Holtmaat, above n 3, 107.

[15] Cusack, above n 13, 156.

[16] Celestine Nayamu Musembi, 'Pulling Apart? Treatment of Pluralism in the CEDAW and the Maputo Protocol' in Anne Hellum and Henriette Sinding Aasen (eds), *Women's Human Rights: CEDAW in International, Regional and National Law* (Cambridge University Press, 2013) 183, 213.

[17] Holtmaat, above n 3, 113.

discourse and practices. Therefore, achieving the core aim of CEDAW, which is legal and substantive equality for women, is not possible if the cultural background remains unchallenged or unchanged. Changing or challenging the cultural background, however, which requires fundamental cultural and social change, would not be possible if the states parties were unwilling to promote such change.

States parties' willingness in this thesis means two things. First, it means that the state guarantees the protection and promotion of fundamental human rights and freedoms.[18] The Human Rights Council's *Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice* (2013) points out that 'the essential elements of democracy are a necessary condition for women's substantive equality in public and political life'.[19] The essential elements of democracy were defined by General Assembly Resolution 59/201 (2004) as the following:

> 1. the essential elements of democracy include respect for human rights and fundamental freedoms, inter alia, freedom of association and peaceful assembly and of expression and opinion, and the right to take part in the conduct of public affairs, directly or through freely chosen representatives, to vote and to be elected at genuine periodic free elections by universal and equal suffrage and by secret ballot guaranteeing the free expression of the will of the people, as well as a pluralistic system of political parties and organizations, respect for the rule of law, the separation of powers, the independence of the judiciary, transparency and accountability in public administration, and free, independent pluralistic media.[20]

Following this, the HRC's *Report of the Working Group on Discrimination against Women* argues that, to ensure the capacity of women to participate in political and public life in an equal manner to men and 'to build autonomous movements for their own empowerment, they must be able to exercise their rights to freedom of thought, conscience, religion, expression, movement and association'.[21] Thinking about this through a background-vernacularist framework, I would argue that these rights are necessary so that feminists and human rights advocates can deploy cultural tools and

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[18] Chinkin, above n 1, 3.

[19] Human Rights Council, *Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice*, 23rd sess, Agenda Item 3, UN Doc A/HRC/23/50 (19 April 2013) [30] ('HRC, *Report of the Working Group*').

[20] General Assembly, Resolution Adopted by the General Assembly on 20 December 2004: 59/201. Enhancing the Role of Regional, Subregional and Other Organizations and Arrangements in Promoting and Consolidating Democracy, 59th sess, Agenda Item 105(b), UN Doc A/RES/59/201 (23 March 2005) [1].

[21] HRC, *Report of the Working Group* [34].

re-interpret them freely without fear of prosecution or violent attack from either the state or other social groups.

A parallel argument can be found in the report of the Special Rapporteur in the field of cultural rights, Farida Shaheed. In her report submitted to the General Assembly in 2012, Shaheed pointed out that women 'must enjoy the freedom to create new communities of shared cultural values around any markers of identity they want to privilege, new cultural meanings and practices without fear of punitive actions, including any form of violence'.[22] For Shaheed, women must be freely able to accept or reject any cultural practice or identity. In addition, as Shaheed pointed out, women must be able 'to revise and (re)negotiate existing traditions, values or practices, regardless of their provenance'.[23]

The HRC's *Report of the Working Group on Discrimination against Women* points out that women's human rights advocates 'engage actively in different normative regimes, including religious communities and indigenous or customary groups. They do so, among others, by initiating hermeneutic projects within their respective religions.'[24] In addition, they engage in their cultural communities by expressing opinions on politics and also expressing their opinions through the arts, 'including writings, music and plays'.[25] However, the works of these women's human rights advocates have been 'attacked, criminalized and condemned by State and non-State actors'.[26]

As I have pointed out with respect to Tunisia even an autocratic government may make changes that favour women's rights. As mentioned above, some willingness on the part of the state to accept the rights that are essential elements of democracy is necessary, otherwise women's groups and groups sympathetic to gender equality would not be able to lobby for changes. The background-vernacularist approach, as I have indicated in previous chapters, is a socio-cultural approach that attempts to change the cultural background of cultural norms and social meanings that constitute

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[22] General Assembly, report of Farida Shaheed, Special Rapporteur in the Field of Cultural Rights, *Cultural Rights: Note by the Secretary-General*, 76th sess, Item 70(b) of the provisional agenda, UN Doc A/67/287 (10 August 2012) [28].
[23] Ibid.
[24] HRC, *Report of the Working Group* [47].
[25] Ibid.
[26] Ibid.

the inferior status of women and to vernacularize international human rights norms and principles in the local legal and social context. This approach, as I discussed in previous chapters, cannot work by itself. I have argued that a politico-legal approach is also required. The state in this sense is one of the main actors which can promote change. This does not mean that women's groups and groups sympathetic to gender equality can be excluded from this process. However, women's groups and groups sympathetic to gender equality may be compelled to use the available methods, and occupy the place made available for them, by the state. If such groups exist under authoritarian regimes, some essential elements of democracy might not be available to them. Elements of democracy such as independence of the judiciary, transparency and accountability in public administration, and autonomous women's rights movements may not exist under authoritarian regimes. Advocating for such elements may do more harm than good for the development of the women's human rights movement in such political and social contexts because the movement may be conceived as a threat to the existence of the regime. Hence, the state may take measures to eliminate such movements or social groups, as I indicated in chapters 3 and 4.

Second, a state party's willingness means that the state party makes efforts to comply with CEDAW's norms and principles and to follow the CEDAW Committee's recommendations and observations. Chinkin points out that, although CEDAW could be considered a tool 'for advocacy and lobbying' by women's human rights advocates across the world, it is only 'an effective tool for advocacy where the state has demonstrated the political will to comply' with it.[27]

As I have shown in previous chapters, Egypt and Tunisia have demonstrated a basic willingness to implement CEDAW. However, both of them have admitted that cultural issues in each country have affected their ability to achieve better levels of equality. In this sense, the state party's willingness does not mean that full compliance with CEDAW is possible because the norms of CEDAW also need to be legally and culturally legitimized. Holtmaat writes:

> Even if a State is willing to bow its head under international pressure or is voluntarily willing to accept international human rights standards, it may be very difficult for it to effectively implement these norms in the international legal order as well as at the horizontal level (i.e. between private parties or citizens among themselves). This is

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[27] Chinkin, above n 1, 7.

particularly so when an international norm requires a change of well-established patterns of conduct that are based on tradition, religion, custom or culture of many of its inhabitants … In order to be able to implement this norm, it is necessary that the State is *legally* and *culturally* legitimised to enforce or even promote such change.[28]

As I discussed previously in this thesis, in order to legitimize the norms of CEDAW, cultural tools should be used, as a first step, to dismantle the cultural background or social meanings that determine the inferior status of women and that deprive them of the full enjoyment of their humanity. Changing the background in this way opens a space for the second step to take place, which is vernacularizing human rights norms into the domestic language and discourse.

III.   The background-vernacularist approach and culture

However, there is an ambiguity in the background-vernacularist approach. One may ask how can culture, which is the main source of women's oppression, be one of the sources of the promotion of women's human rights? How can the background-vernacularist approach resolve the tensions between harmful cultural practices and the promotion of women's human rights by using culture? It is a difficult task to provide a specific and persuasive answer to these questions. One of the possible answers is that culture is diverse, as I will discuss later in this chapter. It contains many strands, and is never one single thing. It contains many contradictory elements, and historical elements. The key is obviously finding and strengthening those elements of culture that will help to combat the oppression of women. As I indicated in Chapter 1, Western feminism was based on liberalism. The idea of equality and freedom which had become so strong under liberalism allowed (and continues to allow) a critique of patriarchy. On the other hand, it is true that culture is one of main sources of women's oppression. The obvious example of this is harmful traditional practices. It is important to recognize that culture and traditional values can cause more harm than good to vulnerable groups, as I will discuss later in this chapter. The Beijing Declaration and Platform for Action, in its Fact Sheet No 23, points out that traditional 'cultural practices reflect values and beliefs held by members of a community for periods often spanning generations'. Some traditional cultural

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[28] Holtmaat, above n 3, 119; see also C Packer, *Using Human Rights to Change Tradition* (Intersentia, 2002) 15.

practices and beliefs 'are beneficial to all members, while others are harmful to a specific group, such as women'.[29]

In its *General Recommendation No 19*, the CEDAW Committee points out that the traditional positions and values that enforce the notion of women's subordination to men as one manifestation of stereotyped roles have created practices that are harmful for women.[30] In the *Joint General Recommendation No 31 of the CEDAW Committee and General Comment No 18 of the Child Committee on Harmful Practices*, the CEDAW Committee and the Committee on the Rights of the Child addressed cultural harmful practices as human rights violations.[31] They stated that these harmful practices are 'grounded in discrimination based on sex, gender and age, among other things, and have often been justified by invoking sociocultural and religious customs and values'.[32] What makes these practices violations of human rights is the violence. This violence is frequently justified by referring to cultural or religious values. Therefore, recognition of cultural values may cause a violation of human rights.

Furthermore, recognition of culture in promoting women's human rights may easily collapse into cultural relativist discourse. The primary mainstream discourse used to resist the idea of the globalization of human rights is cultural relativism. Cultural relativism originally gained its legitimacy from the American Anthropological Association, which argued in the early twentieth century that the standards of human rights could not be universalized.[33] In its statement submitted to the Commission on Human Rights in 1947, the American Anthropological Association (AAA) asserted

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[29] Examples of harmful traditional cultural practices include female genital mutilation (FGM), early marriage, son preference and its implications for the status of the girl child, female infanticide and dowries. See Office of the United Nations High Commissioner for Human Rights, *Fact Sheet No 23, Harmful Traditional Practices Affecting the Health of Women and Children* <http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf>.

[30] These practices include 'family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision'. These violent practices against women have deprived women of enjoyment of equality and freedom. They maintain the status quo of women's subordinated status to men, which causes 'the low level of political participation' and lower level of education for women. Committee on the Elimination of Discrimination against Women, *General Recommendation No 19*, 11th sess, UN Doc A/47/38 (1992) [11].

[31] CEDAW Committee and Committee on the Rights of the Child, *Joint General Recommendation No 31 of the Committee on the Elimination of Discrimination against Women/General Comment No 18 of the Committee on the Rights of the Child on Harmful Practices*, UN Doc CEDAW/C/GC/31-CRC/C/GC/18 (14 November 2014).

[32] Ibid [7].

[33] Susan C Breau, 'Human Rights and Cultural Relativism: The False Dichotomy' in Javid Rehman and Susan C Breau (eds), *Religion, Human Rights and International Law: A Critical Examination of Islamic State Practices* (Martinus Nijhoff Publishers, 2007) 137, 138.

the importance of respecting the cultures of different human groups.[34] It asserted that respect for the individual should include respecting individuals as part of their group.[35] The human group formulates their behaviour and they consider that their self-determination is with their group. The AAA questioned the validity of the Universal Declaration of Human Rights (UDHR). It questioned how the proposed declaration could be applicable to all human beings, when it only uses the predominant values of the Western European countries and North America.[36] The AAA argued that individuals' manners, thoughts, hopes and moral values, which direct their actions and justify them and give meaning to their lives, were formulated by the customs of the groups of which they are a part. Moreover, the AAA argued, the principles of the burden of the white man were being deployed in order to economically exploit non-Western people and deny their right to self-determination. This enabled Western countries to control the affairs of millions of people in the world.[37] It could be understood from the AAA's argument that the UDHR cannot be universalized because of the cultural specificity of the values and norms that should be respected. Stephanie Lawson writes:

> Relativist assumptions about the cultural specificity of values and norms seem to preclude the possibility of universally valid moral precepts. It is taken as self-evident that ethical systems represent constructions of reality based on a particular world view, and that such axiomatic constructions are irreducibly varied by virtue of their cultural foundations, thereby making relativism inescapable.[38]

However, although the AAA's argument, which is a cultural relativist argument, seems logical to some degree, it is problematic for a number of reasons. The first reason is that culture is not a source of harmony for all individuals in a specific society. Respect for individual cultures, for instance, should take into account the position of both men and women. In addition, it should take into account that cultures are not just one set of beliefs but have diverse and often conflicting values, as I will discuss later in this chapter. The problem with the AAA's statement is that it treated

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[34] Executive Board, American Anthropological Association, 'Statement on Human Rights' (1947) 49(4) *American Anthropologist* 539.

[35] For a detailed discussion of AAA's Statement see Karen Engle, 'From Skepticism to Embrace: Human Rights and the American Anthropological Association from 1947-1999' (2001) 23 *Human Rights Quarterly* 536.

[36] Ibid.

[37] Ibid.

[38] Stephanie Lawson, 'Democracy and the Problem of Cultural Relativism: Normative Issues For International Politics' (1998) 12(2) *Global Society* 250, 254.

the individual as a man. This can be seen clearly when it used pronouns that refer to the individual such as 'he' and 'his'. It seems that the AAA perceived individuals in each society as a harmonious group who live in equality. Lawson writes that women

> may be suppressed or subordinated by an over-arching cultural paradigm favouring male dominance and privilege. A female member of the community who recognises this may repudiate 'her culture', or certain significant aspects of it. She may also choose to construct her identity primarily on the basis of her gender and articulate her political interests in accordance with her perceived interests as a female, especially *vis-a-vis* male domination.[39]

In this sense, respecting a culture in which women are oppressed could be one form of denying a woman her human rights. It is also true that cultures change over time and that a variety of factors influence these changes, including interaction with other groups, as I have discussed previously. The statement made by the AAA does not take account of the submissions made to the General Assembly by groups from around the world. Furthermore, the AAA did not refer to the participation of countries from Latin America, 40 and the position of AAA's Statement toward self-determination and economic rights seemed not to be clearly highlighted.41

In 2002, the Special Rapporteur on violence against women Radhika Coomaraswamy pointed out that when it comes to women's rights the universality of standards of human rights is constantly denied.[42] As Coomaraswamy argues, cultural relativist arguments are frequently called upon to deny the universality of human rights when it comes to discrimination against women. Therefore, Coomaraswamy argues, cultural relativism is often used as an excuse 'to allow for inhumane and discriminatory practice against women in the community'.[43] She expects that the problems posed by the cultural relativist discourse and the 'implications of women's rights' will be 'one

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[39] Ibid 256.
[40] For the discussion of Latin American countries participation in international human rights declaration see Mary Ann Gelndon, 'The Forgotten Crucible: The Latin American Influence on the Universal Human Rights Idea' (2003) 16 *Harvard Human Rights Journal* 27; see also, Felipe Gomez Isa and Koen de Feyter (eds.), *International Human Rights Law in a Global Context* (Universidad de Deusto, 2009) 30.
[41] Jack Donnely, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281.
[42] Radhika Coomaraswamy, Special Rapporteur, *Cultural Practices in the Family that are Violent towards Women*, UN Doc E/CN.4/2002/38 (31 January 2002).
[43] Ibid [1].

of the most important issues in the field of international human rights' in the next century.[44]

At this stage, it might be useful to point out that the background-vernacularist approach does not argue for cultural relativism.[45] It supports the universality of human rights. But it suggests that, in order to universalize human rights standards, these standards should be implanted in the domestic legal and cultural discourse, through the vernacularization of human rights norms. According to the background-vernacularist approach, as I have developed it, this vernacularization is unlikely to be effective without challenging or changing the background of social norms and meanings that reinforce the inferior status of women. Vernacularization therefore requires that those elements of the background which may resonate with human rights, are drawn out and strengthened. As I discussed in Chapter 2 challenging or changing the background suggests that the master's tools together with a critical re-interpretation of those tools can dismantle the master's house. The master's tools, as I discussed in Chapter 2, are the discourses that establish the background of cultural norms or social meanings. What makes the master's tools useful for feminism is that they include various resources, some of which can be deployed as tools to resist an authoritative discourse. This involves constructing and using a hybrid discourse, as I discussed in Chapter 3: building upon on one social language to turn it in the advantage of another social language. This is an attempt to draw a new discursive picture based on the original discursive picture.

To understand this, it is necessary to consider the nature of culture. Yakin Erturk defines culture as 'the set of shared spiritual, material, intellectual and emotional

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[44] Ibid.

[45] One of the problems with cultural relativist discourse is that it can be used by states to justify their failures to comply with international human rights law. Fernando Teson writes:

> The tension between national sovereignty and the enforcement of international human rights standards is highlighted when governments point to national cultural traditions to justify failures to comply with international law. States espousing such positions have found invaluable allies not only in Third World writers, but also among certain Western legal scholars, anthropologists, and philosophers … In the context of the debate about the viability of international human rights, cultural relativism may be defined as the position according to which local cultural traditions (including religious, political, and legal practices) properly determine the existence and scope of civil and political rights enjoyed by individuals in a given society.

Fernando R Teson, 'International Human Rights and Cultural Relativism' (1985) 25 *Virginia Journal of International Law* 869, 870; see also Jack Donnelly, *Universal Human Rights in Theory and Practice* (Cornell University Press, 3rd ed, 2013) 73–118; Jack Donnelly, 'State Sovereignty and International Human Rights' (2014) 28 *Ethics & International Affairs* 225; Alison Dundes Renteln, *International Human Rights: Universalism Versus Relativism* (Quid Pro Books, 2013).

features of human experience that is created and constructed within social praxis'.[46] Erturk points out that, despite the fact that the interpretations of culture seem diverse from one society to another, they have some similarities. First, the cultural values and norms that govern a specific society are usually conceived as static and homogenous. Second, these static and homogenous cultural values and norms work to reinforce 'hegemonic and patriarchal power relations'.[47]

It might be useful to consider a frequently used definition of culture in literature, which is a definition proposed by Edward Burnett Tylor. Although this is a very old definition of 'culture', it is still relevant. Tylor defined culture as follows:

> Culture or Civilization, taken in its wide ethnographic sense, is that complex whole which includes knowledge, belief, art, morals, law, custom, and any other capabilities and habits acquired by man [sic] as a member of society. The condition of culture among the various societies of mankind, in so far as it is capable of being investigated on general principles, is a subject apt for the study of laws of human thought and action.[48]

Bronwyn Winter, Denise Thompson and Sheila Jeffreys point out that feminist anthropologists have drawn upon this definition and argued that the behaviour of men and women 'can change, and that both sexes can deviate from cultural norms in working to bring about such change'.[49] The Human Rights Council's *Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice* (2015) points out that 'Culture is a broad concept encompassing all forms of conduct, organization and human behavior within society, including family, language, religion, philosophy, law, government, art and sport'.[50] The report further points out that culture 'is not a static or unchanging concept, although some States tend to present it as such in order to justify inequality between men and women'.[51] In this sense, since 'cultures are neither homogeneous nor unchanging, there are very significant differences between them concerning their stages of development and the extent to

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[46] Yakin Erturk, Special Rapporteur on Violence against Women, *Intersections between Culture and Violence against Women,* UN Doc A/HRC/4/43 (17 January 2007) [17] ('Erturk, *Intersections between Culture and Violence*').

[47] Ibid [51].

[48] Edward Burnett Tylor, *Primitive Culture: Researches into the Development of Mythology, Philosophy, Religion, Art, and Custom* (J Murray, 1871) 1.

[49] Bronwyn Winter, Denise Thompson and Sheila Jeffreys, 'The UN Approach to Harmful Traditional Practices' (2002) 4(1) *International Feminist Journal of Politics* 72, 78.

[50] Human Rights Council, *Report of the Working Group on the Issue of Discrimination against Women in Law and in Practice*, 29th sess, Agenda Item 3, UN Doc A/HRC/29/50 (2 April 2015) [10].

[51] Ibid.

which the patriarchy, misogyny and practices that are harmful to women and girls exist within them'.[52]

The report of the Due Diligence Project, prepared by Zarizana Abdul Aziz and Janine Moussa, which was submitted to the United Nations Working Group on Discrimination against Women in Law and in Practice in January 2015, points out that culture is a social construct and is not static and unchanging.[53] This is 'even if presented as such by some States. Culture is ever changing; it adapts and re-creates itself in support of society's values'.[54] Following this sense, culture 'is constantly reproduced by both collective and individual contributions through exchanges; as such, culture is formed by contestations between differing views. Consequently culture is a living process and is necessarily dynamic, adaptive and innovative.'[55] This aspect of culture makes the background-vernacularist approach possible: culture is adaptable and dynamic.

Rikki Holtmaat and Jonneke Naber divide culture into objective factors and subjective or ideological factors. Objective factors include 'language, buildings, art, institutions (e.g. the family), sports, et cetera'.[56] Subjective or ideological factors include 'beliefs, political ideologies, religion, normative structures, et cetera'.[57] Holtmaat and Naber point out that it can be a hard task to separate objective and subjective factors in practice. Therefore culture should not be seen as fixed and unchangeable because such claims contradict social reality. Holtmaat and Naber write:

> Assertions about the 'definite nature' of a certain culture will often fail to capture the entire social reality. In fact, the incongruity between social reality and ideological systems (laws, procedures, customs, rituals, beliefs and symbols) is a feature of social life in any society. Customs, laws, rituals and rigid procedures precisely serve as cultural frameworks that attempt to capture cultural and social change.[58]

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[52] Ibid [13].

[53] Zarizana Abdul Aziz and Janine Moussa, *The Due Diligence Principle and the Role of the State: Discrimination Against Women in Family and Cultural Life* (United Nations Working Group on Discrimination against Women in Law and in Practice, 2015) <http://www.duediligenceproject.org/ewExternalFiles/DDP%20UNWG%20Submission%20Final%20300115_2.pdf>.

[54] Ibid 5.

[55] Ibid.

[56] Holtmaat and Naber, above n 2, 52.

[57] Ibid. See also Frances Raday, 'Culture, Religion, and Gender' (2003) 1(4) *International Journal of Constitutional Law* 663.

[58] Ibid 53.

Holtmaat and Naber suggest that any culture can be subject to change. However, cultural change is sometimes a hard task because it may trigger a conflict of interests between the social forces in one society. Holtmaat and Naber argue that cultural change will be resisted by the beneficiaries of the current situation.[59] Holtmaat and Naber divide the beneficiaries of the status quo into five categories.[60]

The first category is individual men, who are generally beneficiaries of gender inequality.[61] That is because women are restricted to private work and the 'reproduction of human kind'. Changing the status quo would lead to men losing the power that they hold over women, which is in a cultural sense masculinity.[62] The second category is women who are members of 'particular cultures'.[63] They defend the status quo because of the gender stereotypes that 'describe and prescribe what it means to be a "real" or a "good" woman'.[64] The third category is the family.

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[59] Ibid 70.

[60] Ibid. Holtmaat and Naber are talking about cultural change in general. They do not have a particular society in mind.

[61] Ibid.

[62] This has parallels with Mounira Charrad's discussion of Tunisian social groups that resist the promotion of women's human rights. In her analysis of the shifts in gender policy in Tunisia, Mounira Charrad argues that legislative reforms that affect women's rights including reforms to family law in the Arabic world should be understood 'within the context of conflicts and alliance among key political actors and not simply as policy output generated by the state in response to pressure from below'. Charrad defines political actors as the officials and politicians who work in the government on one hand, versus the social groups who have the upper hand, or the highest stakes in women's oppression. Charrad argues that the social groups who have the upper hand in the oppression of women, at any given time, defend patriarchy on the grounds that it is rooted in the traditions of Islamic law and it represents the Sharia. She identified these groups as follows:

> [a]) the Islamic establishment, b) regions with a predominance of tribal or kin groupings organized along the lines of the Shari'a, and c) political formations that define their identity in terms of a return to Islamic orthodoxy, such as Islamic fundamentalists.

It can be understood from Charrad's argument that the progress of women's rights in Arabic countries did not come from pressure from below. Also, Arabic states and religious institutions have a long historical relationship whether in the form of conflict or in the form of alliances. Charrad writes:

> [w]hen the state is in conflict with social groups … state actors are more likely to engage in policies that expand women's rights. Conversely, when the interests of the state encourage coalition with these groups, state actors are more likely to avoid any action that may jeopardize the coalitions, [sic] They tend to promote policies that curtail women's rights.

M M Charrad, 'Policy Shifts: State, Islam, and Gender in Tunisia, 1930s–1990s' (1997) 4(2) *Social Politics* 284, 311; see also Mounira M Charrad, 'Contexts, Concepts and Contentions: Gender Legislation in the Middle East' (2007) 5(1) *Hawwa: Journal of Women of the Middle East and the Islamic World* 55; Mounira M Charrad, 'Kinship, Islam or Oil: Culprits of Gender Inequality?' (2009) 5(4) *Politics & Gender* 546.

[63] Holtmaat and Naber, above n 2, 71.

[64] Ibid. This can be understood through the argument of Madhavi Sunder. Sunder argues that women's human rights advocates in Muslim communities confront the same choice today, as they must choose between religion and rights. However, as Sunder points out, women's rights advocates have rejected this option through demanding both. As Sunder wrote, by turning 'traditional legal understandings of "right to religion" and the "right to culture" on their heads, these activists are rejecting law's deference to the views of religion leaders and demanding an individual right to construct one's identity, not just

'Families have great interest in raising their offspring in such a way that their position within the wider community is maintained.'[65] This is because, when the reputation of a family is negatively affected, it affects their children and their ability to get married within their community. The fourth category is the male leadership of 'traditional and religious communities, organisations, or institutions'.[66] This kind of group will resist changing the status quo because such change entails 'a change of the rules of who governs these communities or institutions'.[67] The fifth category is the state. The state sometimes resists cultural change and supports the status quo because it attempts to keep its national identity and to distinguish itself from other states.[68]

Drawing upon the discussion above, the recognition of the importance of deploying cultural tools is not a problem per se. The problem is working out how to deploy these tools. Who are the key players who will deploy these tools? Will the deployment of such tools constitute a challenge to the universality of human rights or will it increase compliance with the universalist standards of human rights?

Erturk, among other human rights advocates and theorists, suggests that 'no custom, tradition or religious consideration can be invoked to justify violence against women'.[69] Hence, the recognition of cultural tools does not suggest that the culture should be praised or harmful cultural practices should be respected because they have been justified as practices of the particular culture. What I suggest through the background-vernacularist approach is that, in order to locate human rights norms and principles in any society, the background of cultural norms or social meanings of that society should be challenged and eventually changed.

As Chapter 2 asserted, the background-vernacularist approach embraces multiple methodologies and is applicable in any context as long as the deployed methodology

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without religious and cultural community but also *within* it.' Madhavi Sunder, 'Piercing the Veil' (2003) 112 *Yale Law Journal* 1399, 1412.

[65] Holtmaat and Naber, above n 2, 72.

[66] Ibid 73.

[67] Ibid.

[68] Ibid 74. The appeal to Asian values by some Asian countries is a good example of this. Anthony Langlois points out that those who benefit the most from the absence of political liberalization in Asia have articulated the arguments against it. Anthony J Langlois, 'Human Rights and Cosmopolitan Liberalism' (2007) 10(1) *Critical Review of International Social and Political Philosophy* 29, 33. In addition, for an interesting argument on the conflict between the promotion of women's human rights through the law and national identity in Egypt see Lama Abu-Odeh, 'Egyptian Feminism: Trapped in the Identity Debate' (2004) 16(2) *Yale Journal of Law and Feminism* 145.

[69] Erturk, *Intersections between Culture and Violence*.

aims to challenge the background of social meanings. The aim is to 'construct arguments that are both convincing in the terms of the hegemonic discourse and at the same time transform that discourse'.[70]

In this sense, cultural tools and discourse should be used to deconstruct other cultural tools and discourses; or religious discourse and tools should be used to deconstruct other religious tools or discourses, as Chapter 2 has shown in the discussion of Islamic feminist works. However, it is possible that using a cultural or religious discourse can sometimes lead to more conservative social practices or norms. This can be true. As Hekman suggests, and as discussed in Chapter 2, background concepts tend to be conservative. Nevertheless, she suggests that when feminists deploy the background approach in their arguments for social change and women's empowerment, feminists can guide the argument in a feminist direction. In the same way, the background-vernacularist approach suggests that, even if the methods that the approach suggests seem to be conservative or could lead to more conservative practices or norms, each method can be re-interpreted so that it can be applied to place international human rights norms and principles in that local context.

IV.   Promoting human rights through a better understanding of traditional values of humankind

In its resolution 12/21 of 2 October 2009, the Human Rights Council (HRC) requested the United Nations High Commissioner for Human Rights to hold a workshop to discuss how a better understanding of traditional values of humankind can be useful for promoting human rights.[71] In its resolution 16/3 of 24 March 2011, the HRC welcomed the holding of the workshop on 4 October 2010, and the report presented by the Office of the High Commissioner (OHCHR), which contains the summary of the workshop discussion.[72] In addition, the HRC reaffirmed that dignity,

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[70] Susan J Hekman, *The Future of Differences: Truth and Methods in Feminist Theory* (Polity Press, 1999) 89.
[71] Human Rights Council, *12/21 Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind*, UN General Assembly, 12th sess, Agenda Item 8, UN Doc A/HRC/RES/12/21 (12 October 2009).
[72] Human Rights Council on Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *16/3 Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind*, UN General Assembly, 16th sess, Agenda Item 3, UN Doc A/HRC/16/3 (8 April 2011) [1], [2].

freedom and responsibility can be considered as traditional values shared by all humanity.[73] On the basis of this, the HRC requested the OHCHR to prepare a study on how a better understanding and appreciation of traditional values could contribute to the promotion and protection of human rights.[74] In its resolution 21/3 of 9 October 2012, the HRC requested the OHCHR to 'collect information from States Members of the United Nations and other relevant stakeholders on best practices in the application of traditional values while promoting and protecting human rights and upholding human dignity'.[75]

In 6 December 2012, the Human Rights Council Advisory Committee (HRCAC) presented a study, as requested, on promoting human rights and fundamental freedoms through a better understanding of the traditional values of humankind. The study pointed out that the relationship between traditional values and human rights is complex because, while some traditional values – such as dignity, freedom and responsibility – frame the basis of the universality of human rights, other traditional values have contributed to the subordination of women and minorities in many countries in the world.[76] However, the HRCAC argued that it is possible to increase the effectiveness of strategies that aim to promote human rights and eliminate harmful practices by using arguments based on the positive elements of traditional values.[77] The HRCAC argued that the diplomacy of human rights aims to persuade people of the values of human rights. Hence, this goal could be successful if those values are

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[73] Ibid [3].

[74] Ibid [6]. The voting for this resolution was as follows: 27 states parties voted in favour, 14 states voted against and 7 states abstained. The states that voted in favour of the resolution were Angola, Bahrain, Bangladesh, Burkina Faso, Cameroon, China, Cuba, Djibouti, Ecuador, Ghana, Jordan, Kyrgyzstan, Malaysia, Maldives, Mauritania, Nigeria, Pakistan, Qatar, Russian Federation, Saudi Arabia, Senegal, Thailand, Uganda, Zambia. The states that voted against the resolution were Belgium, France, Hungary, Mauritius, Mexico, Norway, Poland, Republic of Korea, Slovakia, Spain, Switzerland, United Kingdom of Great Britain and Northern Ireland, United States of America. The states that abstained from voting were Argentina, Brazil, Chile, Guatemala, Republic of Moldova, Ukraine, Uruguay.

[75] Human Rights Council on Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *21/3 Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind: Best Practice*, UN General Assembly, 20th sess, Agenda Item 3, UN Doc A/HRC/RES/21/3 (12 October 2009).

[76] Human Rights Council on Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development, *Study of the Human Rights Council Advisory Committee on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind*, UN General Assembly, 22nd sess, Agenda Item 3 and 5, UN Doc A/HRC/22/71 (6 December 2012) [32] ('HRC, *Study of Promoting Human Rights*').

[77] Ibid [45].

expressed as values based on the local traditional values instead of challenging them. Constructing the practices of human rights, as the HRCAC's study pointed out, based on traditional values is an effective long-term strategy. In this sense, the argument for human rights values is more likely 'to be won if it builds on … local cultural traditions' because building 'human rights practices on traditional values is more likely to lead to long-term commitment to human rights ideas and practices through the building of ownership of those norms'.[78]

The HRCAC's study presented a number of successful examples of the deployment of cultural values serving international human rights law and discourse. One of these examples is the positive step taken by Egypt in 2000. Egypt, as Chapter 6 mentioned, passed a law in 2000 that gives women the right to terminate their marriage contracts 'by repudiation, based on the right of *khul*, a sharia law concept'.[79] It can be argued further, as Chapter 5 pointed out, that the establishment of progressive family law in 1956 in Tunisia was based on the deployment of Islamic jurisprudence which forms a key part of the cultural background in Tunisia.

In its conclusions and recommendations, the study asserts that educating local people about human rights through traditional values is an important step in implementing international human rights conventions.[80] Such education, as the study points out, 'can be effective in the local context by rooting human rights in such familiar positive traditional values'.[81] It will enhance the acceptability of the norms of human rights and eliminate 'the negative perception that human rights are foreign or alien concepts'.[82] Therefore, it is important 'to recognize and safeguard the links between positive traditional values and human rights to strengthen universal respect for and implementation of human rights'.[83]

The HRCAC's study suggests clearly that it is useful to consider positive elements of local cultural traditions as means for implementing human rights. Specifically, the positive elements of traditional cultural values may assist with making the diplomacy

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[78] Ibid; see also Daniel Bell, 'The East Asian Challenge to Human Rights: Reflections on an East West Dialogue' (1996) 18 *Human Rights Quarterly* 641.
[79] HRC, *Study of Promoting Human Rights* [49].
[80] Ibid [77].
[81] Ibid.
[82] Ibid.
[83] Ibid.

of human rights possible, which relies on persuasion. In this sense, HRCAC's study suggests that human rights may be promoted though making human rights familiar by building on the positive elements of local cultural values.

Parallel arguments to those in HRCAC's study include Erturk's argument about cultural negotiation and Holtmaat's argument about cultural dialogue. Erturk argues that the universality of human rights discourse can be legitimized through 'systematic engagement in a "cultural negotiation"'.[84] Cultural negotiation, for Erturk, can be useful for asserting the positive elements of culture-based discourses. At the same time, it demystifies the negative elements of cultural discourses. Erturk asserts that such systematic engagement does not aim to 'erode or deform local culture'.[85] Rather, it aims to challenge the discriminatory and oppressive norms and principles of the culture. Yet, Erturk was aware that such systematic engagement will face strong resistance from the beneficiaries of the status quo because 'negotiating culture with human rights concerns inherently questions, delegitimates, destabilizes, ruptures and, in the long run, destroys oppressive hierarchies'.[86]

Furthermore, Holtmaat argues that in order to achieve cultural acceptance of the norms of women's equality, cultural dialogue should take place at the international and national levels. At the international level, for Holtmaat, cultural dialogue should take place between the state and international actors such as the CEDAW Committee. At the national level, cultural dialogue should take place between the state and national stakeholders. National stakeholders, for Holtmaat, could be women's NGOs, and community and religious leaders. Holtmaat writes:

> Many academic commentators acknowledge that the only way out of a deadlock between opposite and fixed positions about women's human rights and culture is to engage in an intercultural or cross-cultural dialogue. When one has to choose between, on the one hand, forcing some cultures to eradicate or abolish traditional practices that are deemed to violate women's human rights (and will thereby most likely generate even more resistance), and on the other hand the position of cultural relativism, in which moral or ethical values, including the values of women's equality and dignity, no longer seem to have any weight, the most effective and safe middle way seems to be to try to start understanding each other and speaking with each other.[87]

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[84] Erturk, *Intersections between Culture and Violence* [52].
[85] Ibid.
[86] Ibid [53].
[87] Holtmaat, above n 3, 120.

Nevertheless, it is not clear from HRCAC's report, nor from Erturk's and Holtmaat's arguments, of the extent to which they have identified the cultural background in Hekman's sense as a specific focus for challenge. It is clear that they agree that local communities may conceive of human rights values as strange in their local context. Therefore, they recommend that human rights education, cultural negotiation and cultural dialogue should take place to make these values familiar so they will be accepted. Through the background-vernacularist lens, this recommendation could be considered an attempt to make familiar what had appeared strange. It is similar to Engle Merry's theory of vernacularization of human rights. However, these authors have not explained exactly how the positive cultural values can be used to challenge other aspects of the culture.

HRCAC's study rightly provided examples of how traditional values have been helpful in implementing some human rights values. One of the examples was the 2000 Egyptian law, *khul*, which allows women to ask for a divorce in court. However, HRCAC's discussion of this example does not specify whether the *khul* law was enacted due to human rights education which vernacularized women's human rights in divorce or through cultural negotiation in Erturk's sense; or whether it was based on challenging some elements of the cultural background that prevented women from obtaining this right. As I argued in Chapter 6, in enacting the *khul* law, Egypt challenged the religious cultural background. However, in the CEDAW Committee meeting to consider of Egypt's report in 2001, as discussed in Chapter 6, the Egyptian representative stated that the *khul* law was enacted after the government put explicit pressure on Islamic law scholars and religious institutions to re-interpret religious texts to grant women the right to initiate divorce in the courts.[88] In this sense, it could

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[88] To understand how the cultural background could be challenged through the background-vernacularist approach, see my analysis of some arguments of Egyptian intellectual Qasim Amin in Chapter 4 and Tunisian intellectual al-Tahir al-Haddad in Chapter 5. It could be argued that the arguments of such intellectuals might be outdated and it might be more useful to consider modern issues. This claim is partly true because these intellectuals made their arguments a long time ago. This may suggest that updated issues should be analyzed rather than referring to old literature. Such an argument, however, may be insufficient for several reasons. First, many issues of women's human rights are related to Islamic family law. Both Egypt and Tunisia, as I discussed in chapters 4 and 5, still keep family law under the umbrella of Islamic Sharia. Second, Islamic Sharia law itself is based on old religious texts. For example, as I discussed in Chapter 2, besides the Quran and Sunna, which were the main sources of Islamic law, the consensus of Islamic law scholars is taken into account on many issues in Islamic law. In this sense, it does not matter whether the religious opinion is old or new. Third, although some Egyptian and Tunisian intellectuals – in their attempts to challenge the cultural background that constituted women's inferior status in Islamic jurisprudence – made their points a long

be understood that the enactment of the *khul* law was based on the strategy suggested by Holtmaat, which is cultural dialogue between the state and the national stakeholders.

From the discussion above, we can understand that the *khul* law was enacted after challenging the cultural background, and that the cultural background was challenged by religious leaders in Egypt. However, in Egypt's reports to the CEDAW Committee and constructive dialogue, there was no explanation of how the cultural background was challenged in order to enact the *khul* law. In addition, they did not specify whether there was a cultural negotiation or dialogue between the state and national stakeholders. Therefore it was not clear whether the government had produced a hybrid discourse that was not purely secular and not purely religious to persuade the religious leaders to accept the project of the enactment of the *khul* law; or whether the government forced the religious leaders to re-interpret religious texts to grant women the right of divorce. Likewise, there was no explanation of how the cultural background was challenged in Tunisia's reports, even in the section that reported on compliance with article 5(a).

Despite the CEDAW Committee's efforts to encourage states parties to develop a comprehensive strategy for compliance with article 5(a), it has not been entirely clear what such a strategy should include. What does the CEDAW Committee want to see in the periodical national reports regarding compliance with article 5(a)? Furthermore, in the Egyptian and Tunisian national reports submitted to CEDAW, the discussion of article 5(a) was brief and not clear. For example, Egypt and Tunisia frequently identified cultural barriers as one of the main obstacles that prevent them complying with article 5(a) without identifying the elements of the cultural background that constitute and reinforce these cultural barriers. Without such a detailed understanding it will not be possible to challenge the cultural foundations. In addition, at times they discussed article 5(b) in more detail than article 5(a). The Egyptian and Tunisian treatment of article 5(a) is difficult to understand.

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time ago, this does not mean these points have been resolved yet. I have re-read and analysed these points through the background-vernacularist lens to understand and to show how they challenge the cultural background or vernacularize outside concepts in the local context. By considering these points briefly, I suggest that what can be applied in, for example, the analysis of Amin's and al-Haddad's arguments can be applied to other intellectuals who argue for challenging the cultural background.

Through the background-vernacularist lens, it could be argued that states parties, especially Egypt and Tunisia, should identify their treatment of article 5(a) in their periodical national reports with reference to the concept of challenging the cultural background. This requires them to identify the specific elements of the cultural background that reinforce gender stereotypes and discrimination. Furthermore, under article 5(a), it might be useful for states parties to explain the main elements of human rights discourse that they have deployed in order to challenge the cultural background, and whether these elements were based on secular or cultural concepts or whether it was a hybrid discourse. In addition, the main message produced by the state through its communication channels should be identified in the report. Besides, information about the elements such as norms, idioms and concepts that constitute the cultural background of discrimination against women should be collected by states parties and analysed through special institutions and workshops. The CEDAW Committee could engage with this process by providing recommendations about how such elements could be challenged. Periodical national reports under article 5(a) should acknowledge which aspects of the background of cultural norms have been challenged and how. What did they do to challenge them? What was the type of discourse that was been deployed? What was the role of national stakeholders, especially women's NGOs? In addition, it might be useful in the periodical national report to nominate which cultural norms will be challenged over the next four years.

Doing this may help the states parties, especially Egypt and Tunisia, as well as the CEDAW Committee to understand how compliance with article 5(a) could become possible. Even if the process that I suggest through the background-vernacularist lens does not promise a quick and certain solution to the problem of compliance, it may provide a new perspective on how compliance with article 5(a) could be evaluated.

V.   Conclusion

In this chapter, I have discussed article 2(f) further in order to explain my understanding of the state's willingness and its role in promoting compliance with CEDAW. Furthermore, I discussed the nature of culture, which 'is a living process and is necessarily dynamic, adaptive and innovative'. This definition enables us to understand the applicability of the background-vernacularist approach, which suggests changing the cultural background and vernacularizing human rights norms.

In addition, understanding culture as dynamic and adaptive enables us to reject claims of cultural essentialism, which was discussed in Chapter 3. Also, it enables us to challenge the claim of cultural relativism, which I discussed in this chapter.

Following this argument, I considered some arguments about deploying cultural values and norms to promote human rights. I have indicated that these arguments do not always identify the precise elements of the cultural background that need to be challenged. Such arguments do seem to appeal to the vernacularization of human rights, or what I call making familiar what had appeared strange, but pay less attention to challenging the foundations of the culture. The extent to which these authors have been aware of the point made in Chapter 2 is unclear. This point is that one cannot simply critique one truth with a different truth, without also making efforts to shift the conditions of the background of the critiqued truth. In this sense, making human rights familiar might not be sufficient to make the negative cultural norms that discriminate against women appear strange. Making human rights familiar through cultural negotiation or dialogue may allow human rights values to be placed in the local discourse as a new truth in opposition to the old truth that discriminated against women. In this manner the new truth will be posited against the old truth. What the background-vernacularist approach suggests is that, before locating the new truth, which is the vernacularized and accepted human rights norms, the elements of the background of the old truth should be changed. I have explained this in chapters 2, 4 and 5.

In this chapter, I suggested that the general framework of the background-vernacularist approach could be helpful in writing the national reports submitted to the CEDAW Committee, especially in reporting on compliance with article 5(a). I suggested that the section that discuses article 5(a) in the national reports should provide much more detail on cultural background. For this purpose, negative cultural norms that reinforce discrimination against women should be collected and analysed by the states parties. They should go through the steps explained in Chapter 2 to change the cultural background and vernacularize human rights norms. This strategy will make compliance with article 5(a) possible.

Conclusion

The central argument of this thesis is that it is possible for states to achieve compliance with article 5 (a) of CEDAW, if there is an understanding of how culturally-informed methods for promoting cultural change can be employed. This understanding should be accompanied by a state's motivation and commitment to promote change.[1] This is because any socio-cultural achievements need to be combined with and symbolically supported by law. Without political and legal support these achievements will remain fragile and possibly under threat both from the state and from conservative members of society and their institutions.

States parties to CEDAW are encouraged by article 5 (a) to modify or change cultural norms in order to eliminate the cultural and customary norms and practices that reinforce gender stereotyped roles, which suggest the inferiority of women to men.[2] Article 5 (a) therefore acknowledges that social and cultural change is required for the advancement of gender equality.

This thesis holds that culture is adaptable and dynamic.[3] In this sense, the argument that I have made in this thesis does not advance either cultural essentialist or cultural relativist claims.[4] This thesis suggests that culture contains diverse and contradictory elements. It should not be considered as a source of harmony for all individuals in a specific society. On the basis of this, my thesis suggests that we should find and strengthen those elements of culture that will help to promote gender equality. This can be done better through a hybrid discourse, which uses one social language to argue for another social language such as cultural-human rights discourse or religious-feminist discourse.[5]

In order to understand how such a hybrid discourse can be deployed, I have developed a theoretical framework, which I called the background-vernacularist approach. This approach is based on Susan Hekman's background approach, which enables and promotes deep social change and resists women's oppression and the masculine norm.

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[1] For the discussion of state's willingness see Chapters 1 and 8. For the examples of state's willingness in promoting women's status in society see my discussion in Chapters 4 and 5.
[2] For the discussion of article 5 (a) see Chapters1 and 7.
[3] See my discussion of the culture in Chapter 8.
[4] For the discussion of cultural essentialist argument see Chapter 3. For the discussion of cultural relativist argument see chapter 8.
[5] For the discussion of hybridity and hybrid discourse see Chapter 3

My approach is also based on Sally Engle Merry's vernacularist approach to the application of human rights norms and principles in the local context. In this thesis, I have incorporated these two approaches with each other to use them as a theoretical framework for my analysis.[6]

I have used the background-vernacularist framework to understand two matters. First, I have used it to understand certain arguments that have been made in favour of the advancement of women's status in Egyptian and Tunisian history. My purpose has been to understand how some cultural tools and values have been used to challenge the cultural background in these contexts, and how some external Western concepts have been vernacularized. As I have pointed out in this thesis, the deployment of the language of the background-vernacularist approach – a feminist, legal, anthropological and human rights language – provides a better understanding of how hybrid discourse has been deployed in certain arguments that have been made in Egyptian and Tunisian history. The language of the background-vernacularist approach has enabled me to re-interpret some works of both Egyptian and Tunisian intellectuals as well as Islamic feminists.[7]

Second, this approach has been used as a theoretical lens to understand the efforts made by Egypt and Tunisia to challenge the cultural background or vernacularize human rights norms. In examining Egyptian and Tunisian reports regarding their reservations to CEDAW and their compliance with article 5 (a), I have found it difficult to identify a specific strategy for compliance with article 5 (a). Through the lens of the background-vernacularist approach, I examined Egyptian and Tunisian materials related to CEDAW in order to determine whether there was evidence that tells us that a reservation to a particular article was withdrawn because an element of the cultural background was changed or because specific women's human rights norms were vernacularized. As I have shown in this thesis, such evidence was not easy to find. This difficulty was due to the fact that Egypt and Tunisia have not have a comprehensive strategy for compliance with article 5.

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[6] I have provided a comprehensive discussion of the background-verancularist approach in Chapter 2.
[7] I discussed Islamic feminism in Chapter 2. I discussed some Egyptian intellectuals who argue for the promoting of women's status in Chapter 4. In Chapter 5, I have discussed the influential work of Tunisian intellectual al-Tahir al-Haddad through the lens of the background-vernacularist approach.

As I have discussed in this thesis, especially in Chapter 8, a possible strategy for compliance with article 5 (a) should include a better understanding of how states parties should treat article 5 (a) in their periodical national reports. I have highlighted the main questions that I believe should be answered in national reports submitted to the CEDAW Committee, regarding the explanation of the states parties' compliance with article 5 (a). For example, states parties' national reports to the CEDAW Committee under article 5 (a) should acknowledge which aspects of the background of cultural norms have been challenged and how. In addition, it might be useful in the states parties' national reports to nominate which cultural norms will be challenged over the next four years.

This thesis concludes that challenging the background of cultural norms that constitutes gender stereotyped roles and gender discrimination in order to replace them with human rights norms and principles should be understood as a long-term strategy. This means that the issue can not be resolved by one thesis or by individual efforts. It is a collective work, which engages many actors and makes many efforts to achieve change. The contribution that my thesis has made is in providing a new perspective that turns our attention to how we can identify the background of negative cultural norms, how it is important to deploy cultural tools to challenge such background in order to replace them with vernacularized norms of equality and freedom. Understanding this may help states parties as well as the CEDAW Committee to understand how compliance with article 5 (a) can become possible.

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